Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. .....

79-648

ROY B. WOOLSEY,

Petitioner,

vs.

TRUSTEES FOR WESTGATE-CALIFORNIA CORPORATION, a Nevada corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

~~C. NEIL ASH,~~
~~202 South Mansfield Avenue,~~
~~Los Angeles, Calif. 90036,~~
~~(213) 939-7872,~~
~~*In Propria Persona*~~
~~*and Attorney for Elaine T. Ash.*~~

ROY B. WOOLSEY,
2099 San Joaquin Hills Road,
Newport Beach, Calif. 92660,
(714) 640-0800,
In Propria Persona.

Of Counsel:
WOOLSEY, ANGELO & THATCHER.

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TRUSTEES FOR WESTGATE-CALIFORNIA CORPORATION, a Nevada corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner hereby requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit (J. Carter) affirming an order of the District Court for the Southern District of California, the "Reorganization Court" herein (J. Nielsen), in proceedings under Chapter X of the United States Bankruptcy Act, to reorganize Westgate-California Corporation, "Westgate" herein, debtor. Said Order of the Reorganization Court authorized a merger.

In addition to the reasons stated herein, Petitioner requests the Writ for the reasons in the petition to be filed by C. Neil Ash and Elaine T. Ash for certiorari to review said judgment.

I
REFERENCES TO OPINIONS BELOW.

The opinion of said Circuit Court of Appeals (A. 1-19)[1] is reported in 601 F.2d 395 (9th Cir. 1979). Its order denying petitions for rehearing (A. 20) is not reported.

The only opinion of the Reorganization Court was the unreported "Findings of Fact, Conclusions of Law and Order" (A. 21-46; Clk. R. 384-408,[2] exclusive of exhibits thereto).

II
JURISDICTION OF THIS COURT.

The judgment of said Court of Appeals, the review of which is sought hereby, was entered on May 30, 1979 (A. 1-19). On June 13, 1979, petitioner filed a timely petition for rehearing which was denied by order entered on August 6, 1979 (A. 20).

The statutory provisions which confer jurisdiction on this court are 11 U.S.C. §47(c) and 28 U.S.C. §1254(1).

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[1]Citations herein to A. are to the Joint Appendix, a separate volume prepared for use herein and in the petition by C. Neil Ash and Elaine T. Ash for certiorari.

[2]Citations to "Clk. R." are to Clerk's Record. Pages 1 to 382 thereof are in the Record on Appeal 77-3662 (the Ashes' appeal); pages 384-490 thereof are in the record on this Petitioner's appeal 78-1227; pages 491-1980 thereof are in the Record on Appeal 77-3388 (Valley National Bank's appeal).

Citations to "Rptr." are to the Reporter's Transcript of Hearings, in the Record on Appeal 77-3662.

Citations to "Info. Stmt." are to the definitive "Information Statement in Connection with a Special Meeting of Shareholders of Air California to be Held on December 21, 1976", in the First Supplemental Record on Appeal 77-3662.

Each of the foregoing records is part of the record on Petitioner's appeal (Clk. R. 440-441).

III
THE QUESTIONS PRESENTED FOR REVIEW.

1. Whether the decision of the Ninth Circuit Court of Appeals, that a controlling shareholder of a corporation may effect a cash freeze-out of the minority shareholders without showing a compelling business purpose for the controlled corporation, conflicts with the California law governing such transaction?

2. Whether, in addition to the California requirement aforesaid, the Trustee of the controlling shareholder in reorganization proceedings has a federal fiduciary duty to the minority shareholders of the controlled solvent subsidiary and the extent of such duty?

3. Whether the plan of merger and its implementation were fair to the minority?

4. Whether the Court's adopting, verbatim, the written findings proposed by counsel without prior service on Petitioner, affects the weight to be given such findings?

5. Whether the opinion of the Court of Appeals sanctioned such departures by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Supreme Court's power of supervision?

6. Whether consummation of the merger on the day the Reorganization Court made its oral decision and written order authorizing the merger and Petitioner's not seeking a stay bars all equitable relief and whether the foregoing render the appeal moot?

IV
CONSTITUTIONAL PROVISIONS AND STATUTES.

Amendment 5 to the United States Constitution provides:

> "No person shall . . . nor be deprived of life, liberty or property without due process of law";

At all times material herein, 11 U.S.C. §586 provided:

> "A trustee . . . shall be vested with title as a trustee under Section 72 of this title would have." (new §§1106-08 include provisions similar to above [former §586]).

11 U.S.C. §75 provided:

> "(a) Trustees shall (1) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest . . .". (new §704 includes provisions similar to the above [former §75]).

11 U.S.C. §589 provided:

> "A trustee or debtor in possession, upon authorization by the judge, shall operate the business and manage the property of the debtor during such period, limited or indefinite, as the judge may from time to time fix, and during such operation or management shall file reports thereof with the court at such intervals as the court may designate." (new §1108 contains provisions similar to above [former §589]).

V
STATEMENT OF THE CASE.

The order of the Reorganization Court granted the respondent's application for approval of, and authority to effect, the merger of Air California, "Air Cal" herein, a California Corporation 81% owned by Westgate, into a wholly owned California subsidiary of Westgate thereby freezing out the minority shareholders (A. 22-46). Petitioner was a shareholder of said Air Cal.

In 1967 Air Cal commenced operations as an airline. In 1970, it issued sufficient new shares to Westgate so that, along with the promotional shares acquired by Westgate, at all times thereafter, Westgate held over 78% of the outstanding stock in Air Cal (Clk. R. 1974; Rptr. 1-14-77, p. 52).

In 1972, Air Cal made a profit; thereafter its profit before income taxes increased about 20% annually (Clk. R. 1975; Rptr. 1-14-77, p. 52) and such increases were assumed for the future in determining reorganization value (Cadenasso's depo. 62 to 64). It added routes or flights each year from 1971 to 1976 (Rptr. 1-14-77 p. 89).

PSA offered $15.75 per share for stock in Air Cal (Rptr. 1-14-77, pp. 86, 87).

The Securities and Exchange Commission, "SEC" herein, caused the suspension of trading in the stock in Air Cal from May 11, 1973 to February 28, 1974 (Info. Stmt. 11).

In July, 1973, respondent Herbert Kunzel became a director of Westgate and in October, 1973, its president (Info. Stmt. 28).

On February 26, 1974, Westgate filed a petition under Chapter X of the Bankruptcy Act, and respond-

ents Curvin J. Trone, Jr. and Herbert Kunzel became respectively its trustee and additional trustee. In 1974, Messrs. Kunzel, Trone and James W. Leisner, a director of Westgate, became directors of Air Cal and the Federal Deposit Insurance Corporation sued Air Cal for $6,950,000.00 principal and interest due on notes, the loan proceeds of which were not received by Air Cal, and for a like sum as punitive damages (Info. Stmt. 28, App. V, pp. 42, 45 and F-25).

Also, in January, 1975, the Trustees made a contract with Air Cal that Air Cal pay to Westgate 82% of Air Cal's tax savings by reason of the filing of consolidated tax returns with Westgate (Info. Stmt. 25, 26).

The high bid and asked over-the-counter prices for Air Cal stock were, in 1974: $11¾ to 12½; in 1975: 8¼ to 9; and in the first one-half of 1976: 9 to 9¾ (Info. Stmt. 11), notwithstanding that it had sold as high as $26.00 a share before 1971 (Clk. R. 1975; Rptr. 1-14-77, p. 52).

For each accounting period during the Chapter X proceeding, Westgate suffered operating losses while Air Cal made profits.

Although faced with large requirements for "reequipment" (Rptr. 1-14-77, p. 77), Air Cal called its seven percent (7%) convertible debentures for redemption as of August 10, 1976. Such debentures with a par value of $3,361,000.00 were redeemed for $3,492,000.00 and debentures with a par value of $73,000.00 were converted into common stock (Info. Stmt. F-58).

In early October, 1976, Mr. Kunzel informed Air Cal's president Robert Clifford that Westgate was considering a merger of Air Cal; until then Mr. Clifford had never considered the possibility of any reorganization for Air Cal (Rptr. 1-14-77, pp. 74-75). Shortly thereafter Westgate and Air Cal jointly retained two investment bankers to give an opinion to Westgate and Air Cal together of the value of minority holders' shares in Air Cal (Rptr. 1-14-77, p. 69).

On November 16, 1976, Messrs. Kunzel and Trone, in the presence of the attorney for them in their capacity as Trustees of Westgate, participated in the discussions and unanimous vote of the Board of Directors of Air Cal to approve the merger of Air Cal into Westgate's wholly-owned subsidiary.

The agreement of merger so approved provides that Air Cal shareholders receive a "Westgate Common Equivalent Certificate", "certificate" herein. Said certificate is not assignable and can be surrendered for $13.00 cash, or more as determined by the Reorganization Court. In the event that certain conditions occur (including that Westgate not be adjudged bankrupt, that it be reorganized, that the plan call for a corporate survivor and said survivor issue stock) the certificate will be converted into stock of the new Westgate and, at holder's option, the stock will still be convertible into cash (Info. Stmt. 4, and Ex. A to App. II).

The common stock of new Westgate into which a certificate will be converted will be such number of shares of new Westgate, if any, as have a reorganization value to be determined at some future date equal to the cash value of such certificate (A. 32-34; Info. Stmt., Appendix II, Exhibit A, page 1; Rptr. 10-4-77, pp. 25-26). Trustees' experts appraised stock in Air Cal at $12.50 per share based on earnings shown

in financial statements for periods through June 30, 1976, less than 7 times the then current annual earnings. Mr. Cadenasso's studies on the reorganization value used 9 and 9.1 times the expected future earnings, including post June, 1975 earnings of Air Cal which would, but for the merger, have been attributable to minority shareholders (Rptr. 1-14-77, pp. 96, 102; Valley's Exhibits A, B and C), assuming over 20% per annum increases in earnings (Mr. Cadenasso's depo., 62 to 64). Mr. Cadenasso's predicted reorganization value assumed the value of stock in Cal Air at $25.00 per share (Mr. Cadenasso's depo., 19 to 22; 100 A).

Proxies were solicited by Air Cal for prior shareholder's meetings but not to vote on the merger. Among other papers, an Information Statement concerning the merger was mailed to each shareholder. On December 21, 1976, Westgate's 81% of the outstanding stock of Air Cal was voted for, and the minority shares were voted 10 to 1 against the merger (Clk. R. 1978, Rptr. 1-14-77, p. 52).

On August 1, 1977 the California Commissioner of Corporations, in a separate proceeding, ruled that the merger would constitute a distribution on the 121,-427 promotional shares in Air Cal held by Westgate, prohibited by the permit for the promotional shares until cash investors shall have received a sum in excess of the cash invested plus 5% a year. The Commissioner released the conditions on the promotional shares on condition that no less than $15.00 in cash per share be paid to the minority shareholders and that the merger be determined to be fair by the Reorganization Court (Clk. R. 2493, 2510, 2576).

Although the Trustees' application for authority to effect the merger alleged certain business reasons for the merger, the Reorganization Court sustained the Trustees' objection to cross-examination by the objecting minority shareholders on the alleged reasons for the merger as being irrelevant (Rptr. 1-14-77, pp. 44 and 57) and said that the issue was whether or not the $15.00 per share was fair (Rptr. 10-4-77, pp. 24-25).

On May 23, 1977, the Trustees gave a notice of further hearing on their application to effect a merger with Air Cal in which they stated that there were problems relating to tuna and pet food operations. "which, apart from Air California, constitute Westgate's major continuing business" and, "pending clarification of these current uncertainties in the outlook for the sea food operations, the Trustees anticipate that they will delay the presentation of a proposed plan of reorganization for Westgate" (Clk. R. 2553).

The Trustees recommended that the price be raised to $15.00 per share in Air Cal. Mr. Kunzel testified that the Trustees had yet to formulate a plan and that the proposed Air Cal merger was an initial step towards the reorganization (Rptr. 10-4-77, pp. 19, 20).

On January 14, 1977 and October 4, 1977, the Reorganization Court took evidence and on October 12, 1977, made its decision to grant the application and signed the findings and order (A. 21-46).

On appeal the Ninth Circuit affirmed the order (A. 1-19).

VI

REASONS WHY THE WRIT SHOULD BE GRANTED.

A. The Decision of the Court of Appeals to the Effect That the Controlling Majority Shareholders May Take the Equity From the Minority Upon a Showing of Mere "Independent, Legitimate Business Reasons" Conflicts With the Applicable California Law.

The state question decided herein is especially important to the administration of estates under the United States Bankruptcy Act. It is contrary to the best interests of those estates to permit a trustee to take from the minority shareholders of a solvent subsidiary of the debtor or bankrupt. One of the impediments to successful proceedings under the Bankruptcy Act is the reluctance of potential investors, creditors and customers of solvent and profitable subsidiaries or other entities of the bankrupt or debtor to deal with such subsidiaries and entities because of the insecurity and uncertainties caused by the power of the trustee and the court to affect their investment or other rights. Shares in such subsidiaries, held by such minority, trade at lower prices than they would without the proceeding under the Bankruptcy Act. Such lower price hampers the raising of equity capital and credit for the use of the profitable subsidiary and the debtor. These factors reduce the chances of successful reorganizations.

The minority shareholders are entitled to rely on the separateness of corporate existence of a solvent subsidiary of debtor or bankrupt and the shareholders' interest should not be subject to the uncertainties and the administrative costs of bankruptcy or reorganization

proceedings which so often consume so much of the estate as to leave the equity holders and even the creditors unsatisfied.

The expansion of jurisdiction of bankruptcy courts under the Bankruptcy Reform Act of 1978 makes protection of third parties more important.

This case is appropriate for a decision on the question raised because there was no testimony nor findings that the merger was not for the purpose of freezing the minority out, nor was there any evidence or any finding to the effect that there was a compelling purpose.

Likewise, the limitation imposed under the California case law on the exercise of corporate statutory powers by fiduciaries (controlling shareholders and directors) is an important state law matter. Protection of the minority encourages investment to the benefit of the entire economy.

The Court of Appeals' opinion herein correctly assumed that, in exercising debtor's powers, the Trustees, as controlling shareholders and as directors of Air Cal, were required to comply with California fiduciary duties (A. 8 and 11-12). In this case, the Trustees merely exercised powers of the debtor succeeded to under the Bankruptcy Act, 11 U.S.C. §§586 and 75, and stood in the shoes of the debtor with no greater rights than the debtor had: *American Service Co. v. Henderson*, 120 F.2d 525, 530 (4th Cir. 1941). See also, *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 428-429 (1972), and *B-F Building Corporation v. Coleman*, 284 F.2d 679, 682 (6th Cir. 1960).

However, the Court of Appeals came to the erroneous conclusion herein that, under California law, the controlling shareholders may take advantage of their power

over the minority by depriving the latter of their equity in, and forcing them out of, an enterprise when the majority will acquire that equity if merely "(1) the merger . . . has independent legitimate business reasons and benefits the corporation, and (2) the minority are treated fairly and without disadvantage." (A. 12).

The business reason or "business judgment" test of corporate action applies where the controlling shareholder takes nothing from the beneficiary of the fiduciary duty; for example, forcing a minority to give up its interests upon a merger into a third party under a plan pursuant to which the majority also gives up its interest on the same terms.

However, where the fiduciary takes from the minority, California cases require that either there be "no alternative" to the corporate action or there be a "compelling business purpose" for it. The opinion herein incorrectly states the rule of each of the cases cited therein on this point (A. 12). In *Jones v. H. F. Ahmanson & Co.*, 1 Cal.3d 93, 110; 81 Cal.Rptr. 592, 460 P.2d 464, 471 (1969), the court held that relief was available to the minority because the majority did not show that there was no alternative to the action taken and in *Fisher v. Pennsylvania Life Co.*, 69 Cal.App.3d 506, 513; 138 Cal.Rptr. 181 (1977), because a compelling purpose was not shown. In *In Re Security Financial Co.*, 49 Cal.2d 370, 376; 317 P.2d 1 (1957), the California Supreme Court said:

> ". . . He did not act in bad faith in doing so for a shareholder . . . may protect his investment by dissolution . . . when, as in this case, all alternative methods are foreclosed, no advantage is secured over other shareholders, and no rights of third parties will be adversely affected."

The Ninth Circuit stated in *Klaus v. Hi-Shear Corp.*, 528 F.2d 225, 233 (9th Cir. 1975);

> ". . . But language in *Ahmanson* requires management to demonstrate more than that the corporation derived some advantage from its actions. The majority shareholders in *Ahmanson* exercised control over the corporation for their own advantage:
>
> > without regard to the resulting detriment to the minority stockholders and in the *absence of any compelling business purpose* . . . At the trial they may present evidence tending to show such good faith or compelling business purpose that would render their action fair under the circumstances." [Emphasis added].

Crain v. Electronic Memories & Magnetics Corp., 50 Cal.App.3d 509, 522; 123 Cal.Rptr. 419 (1975) states the rule as requiring that there be no alternative.

In *Pepper v. Litton*, 308 U.S. 295, 308 and 311 (1939), this Honorable Court said that the majority shareholders and directors have fiduciary duties to the minority and cannot take a benefit from the latter.

There is a growing recognition in the courts of the fiduciary duty of a controlling shareholder to the minority in merger transactions. In *Tanzer v. Intl. Gen. Ind., Inc.*, 379 A.2d 1121, 1124 (Del. Supr. 1977), the court said that the interest of the majority must ". . . not be suspect as a subterfuge, the real purpose of which is to rid itself of unwanted minority shareholders . . .". In *Young v. Valhi, Inc.*, 382 A.2d 1372, 1378 (Del. Ch. 1978), the court said the purpose must not be contrived.

It was held that the majority's taking the equity from the minority by a merger violated SEC Rule 10b-5 in *Marshel v. AFW Fabric Corp.*, 533 F.2d 1277 (2d Cir. 1976); a concurring judge said also that there was a breach of fiduciary duty under New York law. In *Green v. Santa Fe Indus., Inc.*, 533 F.2d 1283 (2d Cir. 1975), reversed in *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977), a concurring opinion quoted The Wall Street Journal:

> " '[a] move to go private ordinarily creates a conflict of interest . . .' "

and Barron's that:

> " 'Generally, it is the low price of the stock rather than declining earnings which sends firms private . . .' " (page 1294).

This Honorable Court, in *Santa Fe Indus., Inc. v. Green, supra*, held that the mere breach of a fiduciary duty is not a violation of SEC Rule 10b-5 or §10 of the Securities and Exchange Act of 1934; fiduciary duties are provided by State law and vary from State to State. However, the *Marshel* and *Green* cases represent sound decisional law on New York and Delaware merger laws, and Delaware immediately adopted the rule in the landmark *Singer v. Magnavox*, 380 A.2d 969 (Del. Supr. 1977) as to statutory long form mergers overruling prior case law and applied the rule to short form mergers in *Kemp v. Angel*, 381 A.2d 241 (Del. Ch. 1978).

B. Respondents Did Not Satisfy Their Federal Fiduciary Duties; Whether or Not Such a Duty Will Bar the Exercise of a Power to Merge Corporations Has Not Been and Should Be Settled by This Court.

The existence and extent of Trustees' federal fiduciary duty arising out of Trustees' powers and duties under the bankruptcy laws involves an important question of federal law for the reasons stated at the beginning of Point A, hereinabove.

We find no decision by this Honorable Supreme Court determining whether the Trustee in a reorganization or other bankruptcy proceeding has a federal fiduciary duty to the minority shareholders of the subsidiary controlled by debtor. *Santa Fe Indus., Inc. v. Green, supra*, in which this court ruled that a breach of fiduciary duty by the majority in merging a partially owned subsidiary into the majority did not constitute a breach of federal securities laws, does not bar a federal fiduciary duty for federally appointed trustees or mergers of solvent subsidiaries into a debtor under the Bankruptcy Act.

Trustees are charged with a "level of conduct . . . higher than that trodden by the crowd.": *Meinhard v. Salmon*, 249 N.Y. 458, 464; 164 N.E. 545, and a similar standard was required in *In the Matter of Combined Metals Reduction Company*, 557 F.2d 179, 196-197 (9th Cir. 1977).

Trustees are fiduciaries with a duty to treat all parties fairly as held in *Sherr v. Winkler*, 552 F.2d 1367, 1374-75 (10th Cir. 1977), citing *Wolf v. Weinstein*, 372 U.S. 633 (1963) and *In the Matter of Moulded Products, Inc.*, 474 F.2d 220 (8th Cir. 1973),

cert. den. 412 U.S. 940. The trustee is a fiduciary and stake holder as held in *In Re Lenters*, 225 Fed. 878, 883 (E.D. Pa., 1915).

A fair construction of the powers of the trustee under the Bankruptcy Act, particularly 11 U.S.C. §§75, 586 and 589 then in effect (See IV above), over assets of the debtor and power to affect the rights of third persons interested in assets such as solvent subsidiaries of debtor imposes on the trustee a duty to be fair to such third person. The rule should give as much protection as the California rule requiring that there be no alternative or a compelling business purpose before taking from the minority to give to the majority.

C. Lengthy Findings, Proposed by Counsel and Adopted Verbatim by the Court on the Day of the Decision and Before Service on Opposing Counsel, Should Be Given Little Weight and This Court Should Settle the Extent to Which Such Findings Be Given Weight.

Although this Honorable Court has indicated that a Court may adopt findings proposed by a party, what is meant by their being less helpful or that they are not given the same weight as other findings needs clarification. Also, we find no federal appellate decision settling the question as to whether the Court may adopt such findings when presented by a party without prior service on opposing counsel and opportunity to voice objections and comments. Where the action authorized by an order can be taken, absent a stay of the order, the effect on the right of appellate review of making such findings and the order thereon on the very day of the decision, this question ~~becomes~~ MAKES more important.

Mid morning, on October 12, 1977, the clerk said that the Reorganization Court had decided the matter and would sign an order that day. The findings (A. 21-46), 26 printed pages exclusive of the several exhibits attached thereto, were presented to the Court for signature and signed verbatim without having first been presented or mailed to petitioner. The names and addresses of Trustees' counsel were in the upper left of the first page and the name and address of the firm of such counsel were printed in the left margin of each of the other pages.

Rule 7-108, Rules of Professional Conduct of the State Bar of California provides that a member of the Bar shall not, in the absence of opposing counsel, communicate with a judge except in open court upon the merits of a contested matter pending before such judge:

> "nor shall he, without furnishing opposing counsel with a copy thereof, address a written communication to a judge . . . concerning the merits of a contested matter pending before such judge . . . the rule shall not apply to ex parte matters."

A.B.A. Rule DR 7-110(A), Code of Professional Responsibility, provides that a lawyer shall not contact the judge as to the merits in adversary proceedings except in the course of official proceedings and "(2) In writing if he promptly delivers a copy to opposing counsel . . .".

This Honorable Court approved the trial court's taking the findings verbatim from a brief of a party, see *United States v. Crescent Amusement Co.*, 323 U.S. 173, 184 (1944); in *Schwerman Trucking Co. v. Gartland Steam Ship Co.*, 496 F.2d 466, 475

(7th Cir. 1974), it was said that the appellate court could not ignore the District Court's findings unless they were clearly erroneous.

On the other hand, in several cases, courts have said that findings proposed by counsel and adopted by the court are less helpful or of less weight than those prepared by the Court: *United States v. El Paso Natural Gas*, 376 U.S. 651, 656 (1964); *Edward B. Marks Music Corp. v. Colorado Mag., Inc.*, 497 F.2d 285, 287 (10th Cir. 1974); *In Re Las Colinas, Inc.*, 426 F.2d 1005, 1009 (1st Cir. 1970), saying that the courts do not look with favor on the practice of adopting proposed findings verbatim and it should be limited to extraordinary cases where the subject matter is technical requiring expertise which the court does not possess.

In *Frazier v. Alabama Motor Club, Inc.*, 349 F. 2d 456, 458 (5th Cir. 1965), the court said that findings of fact based solely on undisputed evidence where there is no issue of credibility need not be given weight usually accorded findings.

Judge James M. Carter, author of the opinion below, and Bruce D. Wagner, *Findings of Fact*, 1 San Diego L. Rev. 13 (1964), point out that general order 37 in bankruptcy makes Fed. R. Civ. P., Rule 52(a) applicable in bankruptcy cases, and findings by the referee, unless clearly erroneous, must be accepted:

> "However, where the referee reaches a conclusion from given facts, neither the district court nor the court of appeals is so limited, and in such a situation either court can reach a proper conclusion from the given facts." (pp. 23-24).
>
> ". . . if the findings are based on documentary and other nondemeanor testimony, or on inferences, deductions or conclusions from uncontradicted . . . fact, the findings are subject to a lesser degree of weight." (p. 25).
>
> "A practice in . . . many western states is to ask the lawyers to prepare the findings of fact, conclusions of law and judgment. Judge Skelly Wright states that all the circuits except one have denounced this practice, and quite properly so *if the trial court automatically signs them.* . . . However, it is proper to have the lawyers submit their findings; but the judge should study them, . . . and, if necessary, completely revise them or send them back for revision . . ." (p. 32).
>
> "There should be no question that the formal findings should reflect the facts as honestly found. In some courts the judge will literally 'sew up' a party by finding facts in such a way as to negate an appeal." (p. 35).

The California requirement that findings be served and be signed only after time for objections by the party who did not prepare them should be adopted for federal procedure. If the court is not going to prepare its own findings, each party should have a voice in the findings, which should then be settled by the court. Although such practice and the California Rule of Professional Conduct was called to the appellate court's attention (Petitioner's Opening Brief, pp. 7, 51, 52), the appellate court failed to discuss the effect of the foregoing and ruled that not obtaining a stay together with the consummation of the merger on the day of the oral decision and the signing of the findings precludes an appeal.

This case clearly illustrates the vice of the verbatim adoption of findings. Many findings were clearly erroneous as a matter of law and the court found on subjects it had ruled to be irrelevant (D below). Furthermore, on the day on which the oral decision was made, in San Diego findings were signed, while in Sacramento the merger was consummated, making it difficult to obtain a stay so that appellees could contend that failure to obtain a stay renders the appeal moot and that errors of the trial court became immune from review on appeal.

D. Only by Such a Departure by the Lower Court From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Supreme Court's Power of Supervision, Did the Court Make the Clearly Erroneous Findings That the Plan and Its Implementation Were Fair, Just and Equitable, and That the Trustees and Mr. James W. Leisner (a Director of Both Air Cal and Westgate) Satisfied Their Fiduciary Obligations to Shareholders of Air Cal.

The findings should be given little, if any, effect for reasons stated in C above; those and reasons stated below make supervision necessary. In this case, the evidence should be reweighed on appellate review.

Appellees had the burden of proof that the merger was fair and not a breach of their fiduciary duty. In *Pepper v. Litton,* 308 U.S. 295, 306, this Honorable Court said:

> "The burden is on the . . . (controlling shareholder or group of stockholders) not only to prove good faith . . . but also to show its inherent fairness from the view point of the corporation and those interested therein . . .".

The above was quoted in *Jones v. H. F. Ahmanson & Co.,* 1 Cal.3d 93, 108 and in *Mueller v. MacBan,* 62 Cal.App.3d 258, 274; 132 Cal.Rptr. 222 (1976), S.Ct. hear. den. See also *Credit Manager's Association v. Superior Court,* 51 Cal.App.3d 352, 361; 124 Cal. Rptr. 242 (1975), S.Ct. hear. den. The burden of proof that the trustee as successor to the debtor met debtor's California fiduciary duty, A above, is governed by California law: *Cities Service Co. v. Dunlap,* 308 U.S. 208 (1939), Rule 302, Fed. R. Evid.; Rule 1101, Fed. R. Evid. provides that the same applies in bankruptcy proceedings.

In this case, the party with the burden as to the California and Federal fiduciary duty failed to carry that burden so that the judgment should be reversed as in *Anderson v. General Dynamics Convair, etc.,* 589 F.2d 379, 402 (9th Cir. 1978).

The Reorganization Court found that the implementation of the merger was fair (A. 8, Note 5; A. 33). There was no evidence that the directors of Air Cal acted independently in approving the merger; yet the following was said:

> "THE COURT: It wouldn't have made a bit of difference whether they [the trustees] voted or not, though, would it, because it was a unanimous vote of the Board of Directors [of Air Cal].
>
> "MR. WOOLSEY: Yes, your Honor, and with the attorney for Westgate present and all of the directors under the control of and acting at the pleasure of the majority shareholder, eighty percent, I think the whole thing should be looked upon with suspicion.

> "THE COURT: You don't know those directors as well as I do, Mr. Woolsey. If you can find anybody more independent than Dean Gordon Schaber of the law school up there, and Bill Black, I don't know them." (Rptr. 10-4-77, p. 195:5-16).

Matters should be decided on the evidence presented in court, not what is learned outside of the courtroom. The presence of the Trustees and their counsel during the deliberations and voting by the directors of Air Cal was inherently unfair to the minority shareholders.

The Reorganization Court found that the plan and the certificate were fair (A. 36). There was no testimony that it was fair. The taking of the equity from the minority and giving it to the majority shareholder, absent a compelling purpose, is inherently unfair and cannot meet the requirement to which the Ninth Circuit Court gave lip service that:

> "The minority shareholders are treated fairly and without disadvantage." (A. 12).

The certificate was the only evidence on its fairness. The title was misleading since there was no assurance that it could result in stock of Westgate. The exchange rate described hereinabove in the statement of the case was unfair. The $15.00 per share of Air Cal stock was about seven times current earnings and the value of Westgate for purposes of the conversion will be reorganization value determined by .9 or 9.1 times estimated annual earnings for periods after the proposal of a plan of reorganization. Those estimated earnings include earnings on the interest in Air Cal assets taken from the minority.

The Reorganization Court found that the Trustees and Mr. Leisner satisfied their fiduciary duty (A. 8, Note 5; A. 33). There was no evidence that such was the case. The merger, the plan and the implementation of it, were, as matter of law, contrary to this finding.

Although the Reorganization Court found that the Westgate certificates were to be issued pursuant to a plan of reorganization (A. 36), such finding was clearly erroneous and contrary to the uncontradicted testimony of Trustee Kunzel, that the Trustees had not formulated any plan (Rptr. 10-4-77, p. 19); as admitted in the May 23, 1977 notice, no plan was submitted because of problems relating to the tuna and pet food operations "which, apart from Air Cal, constitutes Westgate's major continuing business" (Clk. R. 2553).

The Reorganization Court found that the benefits to Air Cal would be significant only if Westgate is reorganized (A. 32). There was no assurance that it will be reorganized. It was unfair to take the equity from the minority before it was determined that Westgate would be reorganized.

The alleged benefits to Air Cal did not constitute purposes of the merger even under the Delaware test, that is, not to be suspect of subterfuge, the real purpose of which is to eliminate unwanted minority shareholders: *Tanzer v. International Gen. Ind.*, 379 A.2d 1121, 1124 (Del. Supr. 1977) which must not be contrived as said in *Young v. Valhi, Inc.*, 382 A.2d 1372, 1378 (Del. Ch. 1978). In the latter case, a merger to eliminate potential conflicts of interest and to obtain the 80% ownership required for consolidated

tax returns (which could have been accomplished by buying some shares, not all) were contrived. If the reasons found in this case were sufficient, the requirement for a reason or purpose would be absolutely meaningless. In any merger, such benefits can be claimed to cover the purpose to take the benefit from the minority for the purpose of enhancing the position of the majority.

The reasons cited by the Ninth Circuit (A. 12-13; 31-33) were:

1. Relief from "the reporting requirements imposed on public corporations" (A. 12-13, 31, Clk. R. 393).

The uncontradicted testimony by witnesses for the Trustees was that there was no saving in operating costs (Rptr. 1-14-77, p. 36). The uncontradicted testimony was that the same audit expenses would be required of Air Cal even as a wholly-owned subsidiary of Westgate, if and when stock of Westgate be publicly traded (Rptr. 10-4-77, pp. 109, 110). The Trustees contemplated that if Westgate be reorganized, stock of the new Westgate would be publicly traded. Air Cal, as the only profitable subsidiary of Westgate, would bear 100% of the expenses. There was no finding concerning the net savings over the costs of the merger estimated at $350,000.00 by respondents; there was no balancing of detriments in losing the public market and its advantage for key employee stock options and other advantages. There was no finding that the expenses saved were material. When Westgate bought Air Cal stock, it knew that Air Cal was publicly traded with the reporting requirements which it probably considered to be an advantage.

As stated by Steven W. Hamilton in 4 J. Corp. Law, No. 1, 122 (Fall, 1978), such purported savings by avoiding reporting is specious and:

> "Such a result is harmful to investor confidence and the securities markets and courts should not sanction such majority conduct without substantial justification."

2. The alleged greater access to capital markets after reorganization of Westgate (A. 13, 31-32) because Westgate intended to maintain 80% ownership required for consolidated tax returns and had no intention of selling its shares in Air Cal or permitting a dilutive equity offering (Info. Stmt. 2; Clk. R. 393). Whether Westgate would permit such was ruled to be immaterial (Rptr. 1-14-77, p. 48). Air Cal's president testified that diversification would be an advantage only if the assets were viable and worthy (Rptr. 10-4-77, p. 91). Westgate's assets other than Air Cal produced losses prior to and during the Chapter X proceeding. Air Cal did not need financing at the present time, but would in three or four years (Rptr. 1-14-77, p. 48). The need for capital was disproven by the redemption by Air Cal on August 10, 1976, of $3,361,000.00 par value of its 7% debentures due in 1988, for $3,492,000.00. The undisputed testimony was that Air Cal would have better access to equity capital and credit than a company in reorganization under the Bankruptcy Act (Rptr. 10-4-77, p. 108 and 1-14-77, p. 38). If equity financing is needed, the majority shareholder's duty would be to permit an equity offering. Presumably Westgate will not have the tax losses which justify filing consolidated returns indefinitely. Some of the loss producing assets were sold before the merger but not the cannery business (Rptr. 1-

14-77, p. 64); the Trustees may sell the remaining loss producing assets. Capital requirements with respect to Airport facilities were ruled by the court to be immaterial (Rptr. 1-14-77, p. 88).

3. The removal of potential conflicts of interest (A. 13 and 31) is likewise contrived as held in *Young v. Valhi, supra.* Although Westgate acquired its ownership in Air Cal in 1970, there was no evidence of any problem arising out of any conflict of interest. On the contrary, Air Cal pays to Westgate affiliates 82% of the tax savings by the filing of consolidated tax returns, leases aircraft from a Westgate affiliate, participates in Westgate's retirement plan and has common directors (Info. Stmt. 25, 27, and 28). Hamilton, 4 J. Corp., Law at 124, disapproves of removal of conflicts as a ground of a merger.

4. Greater availability to Air Cal of Westgate's management skills (A. 10 and 32). The President of Air Cal, as a witness for Trustees, testified that management assistance was not necessary in Air Cal's operations (Rptr. 1-14-77, p. 79). The only evidence of management skills was Messrs. Kunzel and Trone's alleged management expertise. The court knew that Mr. Kunzel would not stay on and that he was mad that the court had appointed him[3] and Mr. Kunzel testified that he did not intend to stay on after the Chapter X proceeding (Rptr. 1-14-77, p. 57); the court sustained Trustees' objection to interrogation as to whether or not Mr. Trone had indicated that he would stay on after the proceedings as irrelevant (Rptr. 1-14-77, pp. 56-57). If, after the merger, management

[3]A certain familiarity between trustees and the court is unavoidable. However, information so obtained should be kept out of the decision making process in litigated matters.

in Westgate be available to Air Cal, the uncontradicted testimony was that it would be available even if Air Cal remained only a partially-owned subsidiary (Rptr. 10-4-77, pp. 110-111).

The Reorganization Court's on the one hand precluding evidence on several of the alleged benefits of or reasons for the merger as irrelevant and, on the other hand, making findings that there were such benefits and reasons is gross error.

No cash dividends have been paid by Air Cal and yet the trial court prevented as immaterial inquiries as to why (Rptr. 1-14-77, p. 42). As said by O'Neal and Derwin, "Oppression of Minority Shareholders", page 62:

> "The withholding of dividends is by far the most frequently used squeeze-out technique."

The Reorganization Court heard and decided the case on the theory that no purpose was required and sustained objections to the materiality of cross-examination on such evidence and said it had to determine whether $15.00 was fair and, nevertheless, made findings of benefits to Air Cal.

There was no evidence presented by the Trustees that the only alternative for the future of Air Cal was a complete takeover by its controlling shareholder. Instead, the record indicates that no other alternative was considered by Air California's Board of Directors. In October, 1976, Air Cal's president, who had previously never contemplated a merger or any other reorganization of Air Cal, was informed by Westgate's additional Trustee, Mr. Kunzel, that Westgate contemplated the takeover (Rptr. 1-4-77, pp. 74-75), and investment bankers were retained (Rptr. 1-14-77, p.

69), for an aggregate fee of $125,000.00 to render their opinion as to only the fair value of the shares of the minority holders. The proposed merger was publicly announced on November 6, 1976. The merger approval by Air Cal's Board of Directors, with Trustees' counsel present at all times during the discussion and vote, was without any independent deliberation but was dominated by the Trustees. The purported reasons for the merger were clearly not indicative of a "compelling business purpose." The evidence presented by the Trustees was insufficient to meet even the lower standard under the "Business Judgment" rule.

E. The Opinion Below That the Consummation of the Merger Without Petitioner's Obtaining a Stay Rendered the Appeals Moot Raises a Question Not Heretofore Settled Which Should Be Settled Contrary to the Position Taken by the Court Below.

The question as to whether or not consummation of the merger on the very day of the court's decision and the written order authorizing the merger, bars an appeal from the order is an important question which should be settled by this court.

Rule 62(a), Fed. R. Civ. P. provides that proceedings shall not be taken for the enforcement of a judgment until the expiration of ten (10) days after its entry. As said in *In Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 192 (9th Cir. 1977):

> "The district court, while not stating any reasons for its decision, concluded that Fed. R. Civ. P. 62(a) was inapplicable 'to orders of a district court sitting in bankruptcy and relating to sales of property of the debtor'. . . . 2A Collier on Bankruptcy 14th Ed., ¶25.12, pp. 957-59 (1976) is to the contrary as is *U.S. Manufacturers Equip. Company v. Rugh*, 29 F. Supp. 40 (W.D.Pa. 1939) . . . as has been noted above, we cannot reverse or void the sale; it was completed in accordance with a valid order of the district court and the purchaser is not a party to this appeal."

The rule adopted in the opinion of the court below has the effect of depriving the parties of the right to appeal. The parties could not seek a stay during the short interval between the announcement of a decision of the court and the signing of the order, not previously served on counsel, unless counsel had anticipated the ruling and the grounds therefor and had the application prepared before knowing the contents of the order to be stayed.

The Trustees' application was before the Reorganization Court for over nine months. The Trustees' rush to get the order signed and the merger consummated should not immunize the Trustees from appellate relief. In the spirit of said Rule 62(a), the Trustees should have paused for a few hours in order that objectors to Trustees' application could seek a stay.

Requiring that a stay be sought or obtained as a condition to a right to appeal implies that, if granted, the required bond would be put up. A delay in the merger could have delayed reorganizing Westgate, causing hundreds of thousands of dollars in administration and other expenses; a large bond would have been required.

Such a requirement would effectively insulate the decision from appellate review in all cases where the abused holders of minority shares individually hold

only a small number of shares or are of limited financial means. The requirement that there be a stay is discriminatory and a stay would have been contrary to the best interests of debtor. Neither a stay nor an application therefor should be required.

Due process of law does not require that an appeal be available as said in *Abney v. United States*, 431 U.S. 651 (1977). However, once appellate review is available, due process requires it be unfettered, *Castle v. United States*, 399 F.2d 642, 650 (5th Cir. 1968).

Valley unsuccessfully sought a stay; for others to have sought a stay would have been an idle act not required by the law.

In this case, the opinion on appeal erroneously stated that the appeal sought to "negate the effects of a merger" (A. 1) and to the extent appellant seeks a negation of the merger, the remedy is not available (A. 17). Petitioner concedes that no shareholders of Air Cal can be compelled to return the certificate or cash received for shares in Air Cal. The court can compel Westgate to (1) return assets to old Air Cal and stock in Air Cal to former shareholders who consent to being reinstated; (2) suffer the impression of a trust on the proportion of shares held by respondent in the new Air Cal equal to the proportion of shares in old Air Cal taken from shareholders desirous of giving up the certificate or cash in return for stock; (3) pay the former minority shareholders of Air Cal a sum equal to the benefits to Westgate (*e.g.* enhancement of reorganization value) in excess of the $15.00 per share, (4) issue warrants to purchase the stock, or (5) pay damages equal to the excess ~~of~~ OVER $15.00 of the value or price of an appropriate number

of shares of Westgate stock a reasonable time after the reorganization, if any, when the market will have evaluated the stock absent the depressing effect of reorganization proceedings. In any event, findings that the implementation of the merger was fair and that the three Directors of Air Cal who were Directors and/or Trustees of Westgate satisfied their fiduciary obligations should be deleted. These findings may influence the trier of fact in the suit by debenture holders who seek a remedy because of the calling of the debentures without any disclosure of the plan to merge. After judgment, petitioner moved to have the findings amended to state that they are without prejudice to the rights of the debenture holders (Clk. R. 419 to 423).

Unlike in *In Matter of Combined Metals Reduction Co., supra*, relied on in the opinion herein, we do not seek to set aside the merger here (sale there); we seek only other remedies for the shareholders who have been deprived of their interest in Air Cal.

In *Mills v. Electric Autolite Co.*, 396 U.S. 375, 387 (1970), this Honorable Court said:

> ". . . Possible forms of relief will include setting aside the merger or granting other equitable relief, but, as the Court of Appeals below noted, nothing in the statutory policy 'requires the court to unscramble a corporate transaction' . . . In selecting a remedy, the lower courts should exercise 'the sound discretion . . .'."

Our case is more like *Bosley v. City of Euclid*, 496 F.2d 193, 196 (6th Cir. 1974), where the court held that the demolition of structures the right to possession of which was in issue did not make the appeal

moot because there remained issues of damages and incidental relief.

As said in *Ramberg v. American Investment Co. of Illinois*, 231 F.2d 333, 336 (7th Cir. 1956):

> ". . . And even where the subject matter has been so completely destroyed . . . the court still has jurisdiction to grant incidental relief and the cause is not moot."

The cure for the Trustees' action is straightforward, an offer to restore to their previous status, the minority shareholders who opted for cash in the face of a *fait accompli.*

DATED: October 19, 1979.

Respectfully submitted,

ROY B. WOOLSEY,
In Propria Persona.

Of Counsel:
WOOLSEY, ANGELO & THATCHER.

Supreme Court, U. S.
FILED
OCT 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-648

ROY B. WOOLSEY,

Petitioner,

vs.

TRUSTEES FOR WESTGATE-CALIFORNIA CORPORATION,

Respondents.

C. NEIL ASH and ELAINE T. ASH,

Petitioners,

vs.

TRUSTEES FOR WESTGATE-CALIFORNIA CORPORATION,

Respondents.

Joint Appendix to Separate Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

C. NEIL ASH,
202 South Mansfield Avenue,
Los Angeles, Calif. 90036,
(213) 939-7872,
In Propria Persona and Attorney for Elaine T. Ash.

ROY B. WOOLSEY,
2099 San Joaquin Hills Road,
Newport Beach, Calif. 92660,
(714) 640-0800,
In Propria Persona.

Of Counsel:
WOOLSEY, ANGELO & THATCHER.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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JOINT APPENDIX.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

The Valley National Bank of Arizona, Plaintiff-Appellant, v. Trustee for Westgate-California Corporation, Defendant-Appellee. No. 77-3388.

Roy B. Woolsey, Plaintiff-Appellant, v. Trustee for Westgate-California Corporation, Defendant-Appellee. No. 78-1227.

C. Neil & Elaine T. Ash, Plaintiff-Appellant, v. Trustee for Westgate-California Corporation, Defendant-Appellee. No. 77-3662.

Appeal from the United States District Court for the Southern District of California.

Filed: May 30, 1979.

Before: CARTER and ANDERSON, Circuit Judges, and ROBERT M. TAKASUGI, District Judge.*

CARTER, Circuit Judge:

These consolidated appeals seek to negate the effects of a merger between Air California, Inc., and Westgate-Wacco, Inc., (hereafter Wacco). The former was a publicly-held corporation, 81% of the stock of which was owned by the Westgate-California Corporation (hereafter Westgate), and the latter was a new, wholly-owned subsidiary of Westgate. The merger was sought by Curvin J. Trone, Jr. and Herbert Kunzel in their capacities as trustees in bankruptcy for Westgate, a holding company involved in reorganization proceedings under Chapter X of the Bankruptcy Act, 11 U.S.C.

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*Honorable Robert M. Takasugi, District Judge, Central District of California, sitting by designation.

§ 501 et seq. The merger was approved by the Reorganization Court on October 12, 1977, and the same day, it was consummated. Westgate then owned 100% of the surviving company, Wacco, which immediately changed its name to Air California. Shareholders of the old Air California Corporation were given certificates in Westgate on a one-for-one basis, which were redeemable at the option of the holder for $15 each. In sum, the effect was to turn Air California from a publicly-held corporation to one wholly owned by Westgate.

Appellants here cite various errors allegedly made by the Reorganization Court below. The Valley National Bank of Arizona (hereafter Valley) held 78% of the outstanding shares of Air California as security on a loan it made to Westgate. The essence of Valley's argument is that changing its collateral from shares in a publicly-held corporation to shares in a privately-held corporation constituted impairment of its security in violation of the Fifth Amendment to the U.S. Constitution because it was a "taking" without just compensation and without due process of law. Other alleged errors, dealing with sufficiency of the evidence and burden of proof, are ancillary to this central issue. Valley seeks to have the order granting the merger reversed so that its collateral can be fully restored. We find no reversible error and we therefore affirm the decision of the Reorganization Court as it applies to Valley.

Woolsey disputes the sufficiency of the evidence to support findings of fact as to the fairness, justice and equity of the merger plan, and related findings. We find the evidence to be legally sufficient to support such findings and we affirm as to Woolsey.

The Ashes contend that the Information Statement which announced the proposed merger to Air California shareholders and which explained the reasons for and terms of the merger, inadequately disclosed certain information regarding conflicts of interest of persons involved, prior stated value of the Air California shares, and facts relating to promotional conditions attached to some of the shares which apparently decreased their value. These defects in disclosure, the Ashes argue, constituted violations of Section 14(c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n. They also contend that the directors of Air California followed improper procedures when voting in the merger. As with Valley and Woolsey, we see no merit in the Ashes' contentions and we affirm the decision of the Reorganization Court as it applies to them as well.

The facts relevant to this appeal show that the trustees of Westgate filed with the Reorganization Court on November 30, 1976, an application to effect the merger between Wacco and Air California. Among other things, the application sought permission for the trustees to invest money to effect the merger, to pledge an appropriate portion of the stock of the surviving company to Valley as collateral on its loan, and to determine the fair value of Air California's publicly-held shares so that holders of those shares could be adequately protected in the event of the merger. The application was accompanied by a definitive "Information Statement in Conjunction with a Special Meeting of Shareholders of Air California to be held on December 21, 1976" (hereafter Information Statement) which, in some detail, announced the terms of the merger, its purposes, the parties involved, and

other facts important to the shareholders.[1] The Information Statement also announced that the merger would be voted on at the December 21 meeting. The merger was approved by the shareholders at that meeting.[2] The Reorganization Court conducted evidentiary hearings on the proposed merger on January 14 and October 4, 1977. All parties to these appeals were present during those hearings and presented evidence in support of their respective positions.

After weighing the evidence and considering all the facts, the Reorganization Court ordered the merger approved on October 12, 1977. The order authorized the trustees to borrow and expend funds to implement the merger, directed them to consummate it as soon as practicable, and made other specific mandates. The Court also made findings of fact and conclusions of law. The merger was, in fact, completed the same day it was approved. All former public shareholders were issued Westgate certificates to replace their Air California shares. Many of them have since redeemed those certificates for cash. Of approximately 1,000 former public shareholders of Air California, only Woolsey and the Ashes continue as parties to litigation related to the merger or have otherwise submitted themselves to the jurisdiction of this court.

Neither Woolsey nor the Ashes sought a stay of the order approving the merger. Valley sought stays—both informally before the order was granted and formally thereafter—but its motions were denied by the Reorganization Court. No appeal from the denial of

[1]Allegedly important facts left out or deemphasized in the Information Statement will be discussed more fully below.

[2]The outcome was a foregone conclusion because Westgate held more than enough shares to vote for approval.

those motions was taken; rather, Valley sought a stay in this court. This was also denied. These appeals follow. For reasons stated more fully below, we find no merit to the appellants' arguments and we therefore affirm the judgment of the Reorganization Court.

I. ISSUES RAISED

Although the three appellants allege a host of errors, we find it necessary to comment in detail on only the following:

A. As to Valley National Bank: Did the merger result in a reduction in the value of Valley's collateral so as to constitute a "taking" in violation of the Fifth Amendment to the Constitution?

B. As to Woolsey: Was there evidence to support the Reorganization Court's finding that the merger was fair, just and equitable as to the minority shareholders? Was the Reorganization Court's finding that three directors of Air California who were also trustees (Trone and Kunzel) or a director (James W. Leisner) of Westgate fulfilled their fiduciary obligations to the public shareholders of Air California supported by substantial evidence?

C. As to the Ashes: Was there adequate disclosure in the Information Statement?

D. Did consummation of the merger, coupled with inaction on the part of all three appellants, cause this appeal to become moot?

II. DISCUSSION

A. *Valley National Bank*

As noted above, the merger changed Air California from a publicly-held corporation to one privately held and wholly owned by Westgate. The collateral which

Valley held for the loan it had given Air California had previously been Air California stock owned by Westgate but otherwise marketable to the public. The order granting the merger authorized the substitution of Wacco (now called Air California) stock for the old Air California stock. Because the new collateral could not be traded on the public market, Valley argued below and argues here that the value of its collateral was reduced and that this constituted a taking violative of the Fifth Amendment.

The Reorganization Court found that the value of Valley's collateral was not reduced by the merger; on the contrary, its value was actually increased so that Valley's loaned funds remained secure.[3] Valley disputes this finding, devoting major portions of its briefs to a summary of evidence allegedly in conflict with this finding. We have examined the evidence before the Reorganization Court, and while we note certain conflicts, we see no reason to conclude that the Court's finding here is clearly erroneous. Rule 52(a), Fed. R. Civ. P.; *Thompson v. England,* 226 F.2d 488 (9th Cir. 1955). We do not choose to disturb it.

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[3]The Reorganization Court found that ". . . notwithstanding the absence of a public market for Wacco stock, the economic value of the Wacco shares proposed to be pledged to Valley is at least equivalent to the value of the collateral heretofore held by Valley. By reason of the fact that none of the pledged Wacco shares will have promotional conditions affixed thereto, while a significant number of the Air California shares held by Valley do have such conditions . . . and by reason of the fact that as a consequence of the merger Air California will receive additional equity capital through the exercise of stock options, the Court finds that the value of the pledged Wacco shares is substantially in excess of the value of the pledged Air California shares. Furthermore and in any event, the value of the proposed collateral is substantially in excess of the maximum amount of Valley's claim." Finding of Fact X, Record on Appeal at pp. 2594-95.

Valley takes its argument one step further by claiming that regardless of whether the value of its collateral is reduced, the fact that the merger resulted in a change in its nature or character (from public to private shares) made that change a "taking" in violation of the Fifth Amendment, citing *Security-First National Bank v. Rindge Land & Navigation Co.,* 85 F.2d 557 (9th Cir. 1936) and *In re Los Angeles Lumber Products Co.,* 24 F. Supp. 501 (S.D. Cal. 1936), *rev'd on other grounds sub nom. Case v. Los Angeles Lumber Products Co.,* 308 U.S. 106 (1939). But in both of those cases, the critical defect in the alteration of the collateral was the reduction in its value rather than the mere change in its nature or character. In *Security-First National Bank,* this court found that the reduction of a complaining creditor's debt by 60% violated bankruptcy law as well as the Fifth and Fourteenth Amendments. In *Los Angeles Lumber Products,* the district court condemned any attempt to scale down debts in a bankruptcy proceeding without the necessary approval of two-thirds of each class of creditors. Because, as noted in the preceeding [sic] paragraph, there was no reduction in the value of the collateral Valley held, the constitutional defects of *Security-First National Bank* and *Los Angeles Lumber Products* are not present here, and we find no reason to go beyond those cases to fashion a rule that would require reversal of the Reorganization Court's decision.[4] There is no Fifth

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[4]Valley's contention that the rules regarding burden of proof in the so-called "turnover" cases (*see, e.g., In re Penn Central Transportation Co.,* 494 F.2d 270 (3d Cir.), *cert. denied,* 419 U.S. 883 (1974): *In re Third Avenue Transit Corp.,* 198 F.2d 703 (2d Cir. 1952)) should apply is likewise unavailing. First, there has been no turnover to the debtor of assets held by the creditor as security; i.e., this is simply not a turnover case. Second, the factors which require that

(This footnote is continued on next page)

Amendment violation absent actual impairment of a creditor's security. *Matter of Chicago, Rock Island and Pacific Railroad Co.*, 545 F.2d 1087 (7th Cir. 1976). We therefore affirm as to Valley National Bank.

B. *Woolsey*

As a minority shareholder in the old Air California Corporation, Woolsey objected to his being required to relinquish his stock in that company as a result of the merger. It is his initial contention that the Reorganization Court's finding that the merger was fair, just and equitable was contrary to the evidence.[5] Specifically, he argues that the merger did not comply with certain California merger statutes and that the merger was inherently unfair.

As an initial proposition, we point out that, while the trustees had the burden of proving the merger fair, just and equitable to the satisfaction of the Reorganization Court, it is Woolsey's burden to show to this court that the finding is clearly erroneous. Rule 52(a), Fed. R. Civ. P. We are of the opinion that he has not met that burden.

The California merger statutes to which Woolsey refers are the former sections 4103 and 4107 of the Corporations Code and are quoted in full in the margin.[6] While there is some question as to whether this

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the debtor seeking to have assets serving as security for a loan returned to it should bear a high burden of proving the necessity of such a measure are not present here. A turnover of assets to a debtor appears to be the most drastic remedy allowed under Chapter X of the Bankruptcy Act. It is therefore proper that a party seeking such a remedy should have to meet a high burden of proof before it is allowed. Where, as here, the creditor's collateral is not as severely impaired—indeed, as noted above, it was not impaired at all—and the creditor's control over it is undiminished, it should not be necessary to impose such a burden. Without exploring all of Valley's arguments in favor of applying the turnover rules, or all of the trustees' arguments which show that it would be improper to do so, and that in any event they satisfied the rules, we find them to be inapplicable in this situation.

[5]The finding to which Woolsey objects reads as follows:

> "The Court also finds that implementation of the merger is fair, just and equitable to, and in the best interests of, Air California and its public shareholders, and that Westgate, the Trustees and Mr. James Leisner (who is both a Westgate and Air California director) have satisfied their fiduciary obligations to such shareholders."

Finding of Fact V., Record on Appeal at p. 2589.

[6]The merger statutes to which Woolsey refers are the former sections 4103 and 4107 of the California Corporations Code. They were repealed by Stats. 1975, c. 682, p. ....., § 6, eff. Jan. 1, 1977. Section 4013 (Stats. 1947, c. 1038, p. 2376, § 4103, *as amended* Stats. 1951, c. 1377, p. 3296, § 8 *and* Stats. 1970, c. 671, p. 1302, § 4, operative Jan. 1, 1971) reads as follows:

> "§ 4103. Directors' approval of agreement for merger or consolidation; contents of agreement
>
> "The board of directors of each corporation seeking to merge or consolidate shall, by resolution, approve the terms and conditions of the proposed agreement and the mode of carrying them into effect, as well as the manner and basis of converting the shares of the constituent corporations into shares or other securities of the consolidated or surviving corporation or of a holding corporation of any of the constituent corporations.
>
> "The agreement may provide for the distribution of cash, property, or securities, in whole or in part, in lieu of shares, to shareholders of the constituent corporations or any class of them; but upon such distribution of cash, property, or securities, the liabilities of the consolidated or surviving corporation, including those derived by it from the constituent corporations, plus the amount of the stated capital of the consolidated or surviving corporation, shall not exceed the value of the assets of the consolidated or surviving corporation."

Section 4107 (Stats. 1947, c. 1038, p. 2377, § 4107, *as amended* . . .) reads in pertinent part as follows:

> "§ 4107. Approval of shareholders; required vote; meeting; notice; statement of terms of agreement
>
> The agreement shall be approved by the vote * * * of the holders of not less than two-thirds of the issued and outstanding shares of each class, regardless of limitations or restrictions on the voting power thereof, of each corporation . . . ."

It is conceded by all parties to this appeal that these sections of the code were applicable at the time the merger was approved.

claimed error was properly preserved in the court below, there is enough ambiguity in the Record to allow us to assume that it was. Woolsey claims that the first paragraph of § 4103 was violated because the merger agreement did not give the "basis of converting the shares of the constituent corporations into shares or other securities" of the surviving corporation. Woolsey does not develop this argument, nor does he cite authority to support it. We find it sufficient to note that § 4103 did not require that the directors explain in the merger agreement the basis for the conversion of shares, but only that they approve such provisions. Furthermore, we have examined the Information Statement published in conjunction with the proposal for the merger and find that it adequately explained the conditions of the merger, including the basis for the potential conversion of Westgate certificates into Westgate stock.

Next Woolsey argues that the second paragraph of § 4103 was also violated because some shareholders of Air California became equity participants in the resulting corporation, while others were assured only of cash for their old Air California shares. In arguing that all the shareholders of a given class had to be treated equally in terms of the character of their distribution rights under a merger agreement, Woolsey is reading into § 4103 a requirement that simply did not exist. Neither can it be inferred from reading § 4103 in conjunction with § 4107, as Woolsey has attempted. Section 4107 merely required that any merger agreement—whatever its terms—be approved by two-thirds of the shareholders of each class of shares. No one contends that this was not done. Absent authority to the contrary, we conclude that it was not

improper to guarantee certain shareholders equity participation in the surviving corporation and to guarantee others only fair financial compensation for their shares. *See Giannini Controls Corp. v. Superior Court of Los Angeles Co.*, 240 C.A.2d 142, 49 Cal. Rptr. 643 (1966).

Woolsey alleges a further violation of § 4103 by claiming that Westgate was the surviving corporation and that it had no net worth at the time of the merger. He implies that this fact shows Westgate's liabilities exceeded its assets at the time of the merger, in violation of the second paragraph of § 4103. But it was Wacco—not Westgate—which survived Air California, and no one claims its liabilities exceeded its assets. We see no merit to this claimed error.

Next Woolsey contends that the merger plan was inherently unfair because it failed to guarantee him and other minority shareholders continuing equity participation in Air California. He cites no authority whatsoever in support of this argument. In view of the fact that the then-applicable California merger statutes (discussed *supra*) allowed distribution of cash in lieu of property or securities, there seems to be no support for this proposition.

We have examined Woolsey's other contentions regarding the fairness, justice and equity of the merger, and find they likewise have no merit. In large measure, they constitute attacks on the findings of the Reorganization Court. We have reviewed those findings and the evidence presented, and we conclude that the findings are supported by substantial evidence.

Woolsey's second major objection concerns the finding, quoted in footnote five in the margin, that the trustees of Westgate and the directors of Air California

had fulfilled their fiduciary obligations in bringing about the merger. Although the specific acts constituting the alleged breaches are not explained clearly in the briefs, it appears that the harm alleged to have resulted therefrom includes depriving minority shareholders of continuing equity participation in Air California, and a depressed valuation of Air California stock at the time the merger was approved and carried out.[7]

There is no breach of fiduciary duty owed by a director or majority shareholder to a minority shareholder in the merger context where the action is taken in good faith and is inherently fair to the minority. It is the law in California that requirements of good faith and inherent fairness are met when (1) the merger transaction has independent legitimate business reasons and benefits the corporation, and (2) the minority shareholders are treated fairly and without disadvantage. *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93 (1969). *Accord, Fisher v. Pennsylvania Life Co.*, 69 Cal. App. 3d 506 (1977). *See In re Security Finance Co.*, 49 Cal. 2d 370 (1957).

With regard to the first requirement, we have examined the record and find that the business reasons given for the merger are supported by the evidence. The Reorganization Court was justified in finding that Air California would benefit from being relieved of

[7]As noted earlier, Air California stock was exchanged for so-called Westgate certificates which could be redeemed for $15 each or held and exchanged for Westgate stock upon reorganization of that company. All evidence, including testimony of adverse witnesses, presented to the Reorganization Court pointed to the fact that Air California had a value of less than $15, a fact which Woolsey does not seriously dispute. His contention seems to be that certain acts by the trustees and directors of Westgate and Air California caused Air California to loose [sic] value prior to the merger.

the reporting requirements imposed on public corporations by federal securities law, that it would have greater access to equity capital after Westgate's reorganization, that potential conflicts of interest between Westgate and Air California would be eliminated, and that Air California could then make greater use of Westgate management skills in its operations. The Reorganization Court was likewise justified in finding that Westgate would benefit from the merger by making successful reorganization in the Chapter X proceedings more likely. Woolsey has advanced no persuasive reasons for disregarding these findings, and we therefore decline to do so.

Regarding the second requirement—no disadvantage to minority shareholders—our discussion of the fairness, justice and equity of the merger applies here as well. We state once again that we have found no statute or case which guarantees minority shareholders an equity participation in a merged corporation. We also note that witnesses for the trustees and witnesses otherwise adverse to the trustees all agreed that $15 was a fair price paid for the Westgate certificates as representing the value of the old Air California shares. Independent expert appraisers valued Air California shares at around $12.50 per share during this time period. In addition, those former Air California shareholders who wished to remain equity participants rather than cash out were allowed to retain their Westgate certificates and exchange them for Westgate stock if and when Westgate was reorganized. Finally, all minority shareholders had the option of exercising their appraisal rights. Having carefully considered the options available to minority shareholders, we are left with the impression that they were treated fairly and suffered no disadvantage in the merger.

To the extent Woolsey argues that the trustees and directors somehow conspired to reduce the value of Air California in order to spring the merger when the company's value was low and thus minimize their obligations to the minority shareholders, we reject that argument as being without any foundation in the Record. We will not consider such charges without their having first been considered by a trier of fact. We have also examined other issues raised by Woolsey and find no merit to them.

C. *The Ashes*

The focus of the Ashes' appeal is on the Information Statement which announced the proposed merger. The Ashes claim that certain necessary information was not adequately disclosed, and that other necessary information was undisclosed, all in violation of section 14 of the Securities Exchange Act of 1934, 15 U.S.C. § 78n.[8] Specifically, they claim that the Information Statement did not clearly reveal that the Westgate trustees—Messrs. Trone and Kunzel—were also directors of Air California and that because they were financially compensated for their work as trustees, their voting in the merger proposal as directors represented a potential conflict of interest which required exposure.

[8]Regulations promulgated pursuant to Section 14(c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(c), require the publication and distribution of an information statement announcing and explaining the merger proposal to all shareholders eligible to vote. 17 C.F.R. § 240.14c. Under those regulations, "[n]o information statement shall contain any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the same meeting or subject matter which has become false or misleading." 17 C.F.R. § 240.14c-6.

The Ashes also claim that there was inadequate disclosure of the fact that Mr. Leisner was a director of both Air California and Westgate and could likewise be suspected of conflict of interest. They also point out (correctly) that six months before the merger announcement, the trustees had been authorized to sell Air California shares for $21, but that this fact was not disclosed in the Information Statement. Finally, they note that the Information Statement failed to disclose that large numbers of the Air California shares owned by Westgate were subject to promotional conditions which arguably reduced the value of all of the shares.

As to the Ashes' first claimed error—inadequate disclosure of conflicting interests among the directors and trustees—it should be noted that no one contends the information was undisclosed in the statement or that it was improper for the persons involved to occupy positions in both Westgate and Air California. The sole claim is that the information was "buried" in the information statement and thus did not give adequate notice of potential conflicts. We disagree.

The fact of the dual roles played by Messrs. Trone and Kunzel is revealed in three different places in the Information Statement. Mr. Leisner's positions are disclosed once. In all instances, the text is preceeded [sic] by a headline in boldface type which alerts the reasonable reader to the nature of the disclosure to follow. The type in all instances is of the size and just as prominent as that used throughout the Information Statement. We think the information was adequately disclosed in terms of how it was presented in the Statement. *See Kohn v. American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir. 1972) (the "equal promi-

nence" rule). Furthermore, the locations of the disclosures—on pages 19, 27 and 28 of the Information Statement—offer no compelling grounds for reversal. The Ashes may wish to have seen the potential conflicts appear in the Statement before the directors' endorsement of the merger, but they cite no authority which would require this textual organization. As it is, the disclosures are well toward the front of the Statement, though not as near the front as the endorsement. "[E]very fact cannot be contained in the beginning." *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 602 (3d Cir. 1974).

Next, the Ashes claim it was wrong not to disclose in the Statement the fact that up until six months before the merger proposal was announced, the trustees had authority to sell Air California shares at $21 each. This earlier asking price was determined under special circumstances largely irrelevant to this case, resulted in few if any shares being sold at that price, was terminated, as noted, six months before the merger was proposed, and was material only to the extent it affected the minority shareholders' decision to exercise their appraisal rights rather than retain the Westgate certificates or cash out. No one now claims that the $21 price in fact represented the value of Air California shares at the time of the merger. Furthermore, "Air California unilaterally extended renewed appraisal rights to all Air California shareholders after all relevant information [including this old $21 asking price] became known." Conclusion of Law VI, Record at p. 2601. In light of the foregoing we conclude that this claimed error has no merit.

For similar reasons, the Ashes' third claimed error—failure to disclose promotional conditions attached to

some of the Air California shares owned by Westgate—must also be rejected. The Reorganization Court found that neither Air California nor the trustees of Westgate were aware of the relevance of the conditions until after the merger had been announced. It also found that whatever defects of disclosure resulted were cured by a Supplemental Notice published before the merger was consummated. It is also important to note that, in conjunction with the disclosure of the promotional conditions, Air California consented to increase the redemption amount from $13 to $15, apparently to avoid litigation on the significance of the effect of the promotional conditions on the value of the rest of the shares. We agree with the Reorganization Court that whatever inadequacies existed in the Information Statement as a result of the failure to disclose the promotional conditions were cured by subsequent disclosure and the increase in the redemption figure.

We have examined other related issues raised by the Ashes and find them to lack sufficient merit to warrant discussion or reversal.

D. *Mootness*

To the extent all three appellants seek an equitable remedy in the form of a negation of the merger, there is an additional reason for finding against them; the remedy they seek is not available because of mootness. The merger took place on October 12, 1977. All Air California public shares were redeemed or exchanged for Westgate certificates. The vast majority of persons who were affected by that action are not subject to the jurisdiction of either this court or the Reorganization Court. Only Woolsey and the Ashes remain of the former shareholders. The merged company, Wacco/Air California, has been operating for over two years as

a wholly-owned subsidiary of Westgate. All of these facts make it difficult, if not impossible, to fashion an equitable remedy that would restore appellants to their former positions. *See Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977).

In addition, at least two of the three appellants—Woolsey and the Ashes—would not be entitled to equitable relief even if it were available. Neither of them sought any kind of stay of the order in which the Reorganization Court authorized the merger. This court stated in *Matter of Combined Metals, supra*:

> "the practical necessities involved in a successful reorganization require that unless an order of the bankruptcy judge or the district judge is stayed pending appeal, the trustee's acts in accordance with the order should not thereafter be subject to reversal, even if the order is subsequently overturned on appeal."

557 F.2d at 189. *See In re Abington Realty Corp.*, 530 F.2d 588 (4th Cir. 1976). This failure to obtain, or even seek, a stay effectively precludes Woolsey and the Ashes from the equitable remedy they ask for; absent a stay, it was entirely proper for the trustees to go ahead with the merger. The actions they took pursuant to that order should not be reversed.

The foregoing brief analysis may also apply to Valley. It did, in fact, seek a stay, but was refused by the Reorganization Court. It also sought a stay from this court, but was refused again. Significantly, no stay was sought from the Circuit Justice. Rule 51, Supreme Court Rules. The facts also show that Valley was quite relaxed in its attempts to block or delay the merger. Indeed, for a time, Valley actively supported

the proposed merger. And even after it changed its position, it made no effort to seek a stay until shortly before the merger was consummated, even though it knew well in advance that the merger was being planned and pursued by the trustees. The cumulative impact of these facts suggests to us that Valley's position is not much better than that of Woolsey and the Ashes in terms of its claim to equitable relief.

Ordinarily, if the merger cannot be attacked because of mootness, the order on appeal would be dismissal, not affirmance of the judgment below. However, in the first portion of our opinion (Part II; A, B and C) we hold the judgment should be affirmed on the merits. Accordingly, we permit the first portion of our opinion to govern our order on appeal.

The judgment is AFFIRMED as to the three appellants.

Order Denying Petition for Rehearing and Rejecting Suggestion for Rehearing En Banc.

United States Court of Appeals, for the Ninth Circuit.

The Valley National Bank of Arizona, Plaintiff-Appellant, v. Trustee for Westgate-California Corporation, Defendant-Appellee. No. 77-3388.

Roy B. Woolsey, Plaintiff-Appellant, v. Trustee for Westgate-California Corporation, Defendant-Appellee. No. 78-1227.

C. Neil & Elaine T. Ash, Plaintiff-Appellant, v. Trustee for Westgate-California Corporation, Defendant-Appellee. No. 77-3662.

Filed: Aug. 6, 1979.

Before: CARTER and ANDERSON, CJJ, and *TAKASUGI, DJ.

The panel in the above entitled matter voted unanimously to deny the petition for rehearing of ROY B. WOOLSEY, C. NEIL ASH and ELAINE T. ASH.

The same above named appellants had suggested the appropriateness of a rehearing en banc. Judge Anderson voted to reject the suggestion; Judge Carter and Judge Takasugi recommended the rejection of such a suggestion.

The petition for rehearing and suggestion for rehearing en banc having been circulated to all of the active judges, and no judge having voted for a rehearing en banc,

IT IS ORDERED that the petition for rehearing is denied and the suggestion for rehearing en banc is rejected as to the appellants WOOLSEY and ASH herein.

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*Hon. Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.

The Opinion of the Reorganization Court.[1]
(Except Exhibits)

Law Offices
Wyman, Bautzer, Rothman & Kuchel
Two Century Plaza, Fourteenth Floor
2049 Century Park East
Los Angeles, California 90067
(213) 556-8000 — (213) 879-8000
Attorneys for Trustees

Herman L. Glatt a member of
Stutman, Treister & Glatt
Professional Corporation
Attorneys at Law
Ahmanson Center East
3701 Wilshire Boulevard
Los Angeles, California 90010
Attorneys for Trustees (Special Counsel)

United States District Court, Southern District of California.

In Proceedings for the Reorganization of a Corporation.

In re Westgate-California Corporation, a Nevada corporation, Debtor. 74-413.

In re Wescal Properties, Inc., a California corporation, Debtor. 74-414.

In re Tri-County Ranches, Inc., a California corporation, Debtor. 74-1079.

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[1]The name "Wyman, Bautzer, Rothman & Kuchel" and its address and telephone number appear in the left margin of each page except page 1 where they appear at the top. The Findings, Conclusions and Order, excluding the Exhibits, appeared as pp. 336 to 360 (Appeal 77-3662), pp. 384 to 408 (Appeal 78-1227) and pp. 2579 to 2603 (Appeal 79-3388).

In re West Coast Properties, Inc., a California corporation, Debtor. 74-2271.

Filed: Oct. 12, 1977.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE TRUSTEES' APPLICATION FOR AUTHORIZATION TO EFFECT A MERGER WITH AIR CALIFORNIA

At San Diego, in said district, on the 12th day October, 1977.

This matter first came on to be heard before the Honorable Leland C. Nielsen, United States District Judge, in his courtroom, 940 Front Street, Courtroom 5, San Diego, California 92101, on the 14th day of January 1977, at 9:00 A.M., upon the "Application for Authorization to Effect a Merger with Air California" ("Application") of Curvin J. Trone, Jr. and Herbert Kunzel, Trustee and Additional Trustee, respectively ("Trustees"), of the above denominated debtor estates, pursuant to notice thereof to the above named debtors, their creditors, stockholders, debenture-holders, indenture trustees, the Securities and Exchange Commission and other parties in interest, and to all shareholders of Air California, given in accordance with this Court's Order of November 29, 1976.

The following parties appeared at the aforesaid hearing:

Frank Rothman, Esq., Alan D. Croll, Esq. and Gary N. Jacobs, Esq. of Wyman, Bautzer, Rothman & Kuchel, counsel for the Trustees; Herman L. Glatt, Esq. of Stutman, Treister & Glatt, professional corporation, special counsel for the Trustees; Allen F. Corotto,

Esq., for the Securities and Exchange Commission; John H. Sharer, Esq. and Charles D. Axelrod, Esq. of Gibson, Dunn & Crutcher, counsel for Valley National Bank in its capacity as alleged creditor of Westgate-California Corporation ("Westgate"); Frederick K. Steiner, Esq. of Snell & Wilner, counsel for Valley National Bank in its capacity as Indenture Trustee for Westgate's 6% Subordinated Debentures; Anthonie M. Voogd, Esq. of Lawler, Felix & Hall, counsel for Bank of California as Indenture Trustee for Westgate's 6½% Subordinated Convertible Debentures; Everett M. Clayton, III, Esq. of Latham & Watkins, special counsel for Air California; Boris Lakusta, Esq. of Graham & James, counsel for Air California; Nathan Lane, III, Esq. of Hawkins, Cooper & Pecherer, counsel for Clifford E. Nelson, an Air California shareholder; Roy B. Woolsey, Esq. of Woolsey, Angelo and Thatcher, an Air California shareholder appearing pro se; and C. Neil Ash, Esq., an Air California shareholder appearing pro se.

In conjunction with the January 14, 1977 hearing, the Court received and reviewed numerous pleadings and related documents, including the following: the Application and exhibits thereto; written objections, statements, memoranda and correspondence filed by Valley National Bank (in its capacity as alleged creditor), C. Neil and Elaine T. Ash, Clifford E. Nelson, Roy B. and Louise J. Woolsey, Austin C. Beutel, and Richard A. Norton; and the Trustees' Memorandum of Points and Authorities in Reply to Objections to the Application.

In the course of the January 14 hearing, the Court heard the statements of counsel and the testimony of

Messrs. Herbert Kunzel, Roger Miller, Robert W. Clifford, Ross J. Cadenasso and William K. Bowes, Jr.

Because of certain unresolved issues concerning the merger which were pending before the Department of Corporations of the State of California (the "Department"), the Court continued the hearing, with subsequent continuances to June 7, 1977.

On February 1, 1977, a "Motion for Summary Judgment in Favor of C. Neil Ash and Elaine T. Ash, Objectors to Application for Authorization to Effect a Merger with Air California" was filed, together with an affidavit and Memorandum of Points and Authorities in support thereof. On February 4, 1977 Points and Authorities in opposition to the merger were filed on behalf of Roy B. and Louise J. Woolsey. On February 9 the Trustees and Air California filed memoranda in opposition to the motion for summary judgment. On February 14, 1977 the Court heard argument on the motion and denied the motion after concluding that "there were no material misstatements or failures to state and that all material things were properly stated in the [I]nformation [S]tatement." (Reporter's transcript of proceedings, February 14, 1977, p. 35.)

On May 23, 1977, a "Notice of Further Hearing on Application to Effect a Merger with Air California and Certain Matters in Connection Therewith" ("Supplemental Notice") was mailed, pursuant to prior order of this Court, to the Debtors' creditors, stockholders, debentureholders, indenture trustees and other parties in interest, to all Air California shareholders and to the SEC.

On June 7, 1977 the hearing on the Application was continued to July 19, 1977, because the Department

had not as yet acted upon the Trustees' Application for Removal of Conditions on Promotional Shares of Air California. In the first week of July, 1977, the Trustees and Valley National Bank agreed that the Trustees would request a continuance of the July 19 hearing. The Trustees requested such continuance to afford Valley National Bank an opportunity to take certain depositions with respect to the Application (which depositions have been taken) and because, at the time of such agreement, the Department had not yet rendered its decision on the Trustees' Application for Removal of Conditions on Promotional Shares of Air California, and there was no assurance that such decision would be available prior to the July 19 hearing or in time to afford the interested parties an adequate opportunity to review said decision. On July 13, 1977, the Court entered its order continuing the hearing to October 4, 1977.

On July 6, 1977 (subsequent to the Trustees' agreement with Valley National Bank), the Commissioner of Corporations of the State of California handed down the "Commissioner's Findings of Fact, Conclusions and Final Decision" (the "Decision"), and on August 1, 1977 the Department issued its "Order Removing Conditions" with respect to the promotional conditions imposed on certain shares of Air California. Said Order is itself based upon the satisfaction of certain conditions (which are set forth in full therein).

At the continued hearing, held on the 4th day of October, 1977, the following parties appeared: Frank Rothman, Esq., Alan D. Croll, Esq., and Gary N. Jacobs, Esq. of Wyman, Bautzer, Rothman & Kuchel, counsel for the Trustees; Herman L. Glatt, Esq. of

Stutman, Treister & Glatt, professional corporation, special counsel for the Trustees; Everett M. Clayton, III, Esq. and Fred H. Cohen, Esq. of Latham & Watkins, special counsel for Air California; Boris Lakusta, Esq. of Graham & James, counsel for Air California; Dean Stern, Esq. of Gibson, Dunn & Crutcher, counsel for Valley National Bank in its capacity as alleged creditor of Westgate; Nathan Lane, III, Esq. of Hawkins, Cooper & Pecherer, counsel for Clifford E. Nelson; an Air California shareholder; and Roy B. Woolsey, Esq. of Woolsey, Angelo and Thatcher, an Air California shareholder appearing pro se.

Further pleadings and related documents were received and reviewed by the Court, including the following documents filed in connection with the June 7 hearing: the Trustees' Memorandum of Points and Authorities in Response to Written Objections of Valley National Bank of Arizona Filed in Opposition to the Application for Authorization to Effect a Merger with Air California; the further written objections, statements, memoranda and correspondence in opposition to the merger filed by or on behalf of Joseph Elsant, Roy B. and Louise J. Woolsey, Howard S. Martin, Austin C. Beutel, C. Neil and Elaine T. Ash, Clifford E. Nelson and Valley National Bank (in its capacity as alleged creditor). The Bank of California, Trustee for Westgate's 6½% subordinated convertible debentures due 1987, and William Ball, Successor Trustee to Valley National Bank as Trustee for Westgate's 6% subordinated debentures due 1979, have both filed statements in support of the Trustees' Application. In connection with the October 4, 1977 hearing, the Court has received and reviewed (and has taken judicial notice of the exhibits thereto) further pleadings and

related documents, including the following: the Trustees' Supplemental Application Seeking Authorization to Effect a Merger with Air California ("Supplemental Application"); the Trustees' Supplemental Memorandum of Points and Authorities in connection with Application to Effect a Merger with Air California; written objections, statements, memoranda and correspondence in opposition to the merger filed by or on behalf of Roy B. and Louise J. Woolsey, Kenneth and Grayce Clissett and Clifford E. Nelson.

At the continued hearing, the Court heard the further statements of counsel, the statement of William Ball, successor Trustee to Valley National Bank as Trustee for Westgate's 6% subordinated debenture due 1979, and the testimony of the following witnesses: Ross J. Cadenasso, Herbert Kunzel, William K. Bowes, Jr., Walter Lambert and Claire V. Hansen. In the course of the continued hearing, the Court received into evidence various correspondence, documents and, with respect to Valley National Bank and Westgate, deposition transcripts.

Based upon all of the foregoing proceedings, and good cause appearing, and the Court having concluded that Judgment, consisting of these Findings of Fact, Conclusions of Law and Order ought to be signed and entered without delay.

Now, therefore, this Court makes its Judgment, consisting of its Findings of Fact, Conclusions of Law, and Order as follows:

FINDINGS OF FACT

I

The transaction described in the Application and Supplemental Application involves the merger of Air California into Westgate-Wacco, Inc. ("Wacco"), a wholly-owned subsidiary of Westgate-California Corporation ("Westgate"). The merger and these Findings of Fact, Conclusions of Law and Order will result in the shareholders of Air California, other than Westgate [for purposes of these Findings of Fact, Westgate shall include: West Coast Properties, Inc. ("West Coast") and Tri-County Ranches, Inc. ("Tri-County")], receiving in exchange for their Air California stock, Westgate Common Equivalent Certificates ("Westgate Certificates") having an aggregate face amount equal to Fifteen Dollars ($15.00) per share of Air California stock so exchanged. The specific terms and conditions of the merger, including the rights of redemption of holders of Westgate Certificates and the Redemption Fund to be established in connection therewith, are set forth in detail in the Information Statement relating to the merger heretofore filed with this Court.

II

The merger contemplates an exchange rate of not less than $13.00 perincipal amount of Westgate Certificate for each share of Air California stock so exchanged, and the merger agreements specifically contemplate that such exchange rate could be increased if this Court deemed it appropriate to do so. As a result of the above-described proceedings before the Department, the Trustess have recommended that the exchange rate be augmented by $2.00 per share to a total "exchange" rate of $15.00 per share. Such

augmentation was proposed as the result of the Trustees' recomputation of the exchange rate after excluding all "promotional" shares of Air California owned by Westgate (121,427 out of 722,975 so owned) from any participation in any "distribution" of assets deemed effected as consequence of the merger. The Trustees, in recommending the augmentation of the exchange rate, do not concede that the merger should be deemed to constitute a distribution of assets (and in fact dispute such contention), and the Court does not find it necessary to make a determination of that issue. The Trustees and Air California became aware that the Department did so view the merger after the mailing of the Information Statement and the holding of the Special Meeting of Air California's stockholders. In the course of the proceedings before the Department seeking a resolution of the issue, the Trustees committed to recommend to this Court that the exchange rate be augmented by $2.00 per share to an aggregate exchange rate of $15.00 per share, in order to exclude the promotional shares from any participation in any "distribution", thus rendering the Department's promotional conditions inapplicable to the merger. The Trustees' proposal was made in order to avoid the delay and expense of litigating these issues before the Department and the courts. The Decision and Order Removing Conditions, while premised upon reasoning different from that proferred by the Trustees, granted relief consistent with that requested by the Trustees. Since it is the Court's finding (see *infra*) that the merger, after giving effect to the $2.00 per share augmentation, is of significant benefit to the Debtors' and their contemplated reorganization, the Trustees' recommendation on this point will be, and is hereby, accepted.

III

Completion of the merger in accordance with its terms, as supplemented by the $2.00 per share augmentation, will advance the reorganization of the above-named Debtors in the following principal respects:

A. Effecting the merger will, predicated on presently existing conditions, have the effect of increasing Westgate's Reorganization Value by not less than $1,900,000 after taking into account the costs related to the merger. Such increase in Reorganization Value is desirable in that it enhances the possibility that Westgate's junior classes of creditors and security holders (or certain of them) may participate in the reorganized Westgate;

B. The ability to draw upon cash not needed in Air California's operations, under the supervision of this Court and consistent with contractual limitations applicable to Air California, without taking into account any minority interests in Air California, which would be one result of the merger, could be a significant factor in facilitating the reorganization by, among other things, assisting the settlement of claims and pursuit of litigation, and providing for costs incident to the reorganization.

C. Since the merger is beneficial to Air California (see paragraph IV, *infra*), Westgate, as Air California's parent, is also benefitted thereby.

For the foregoing reasons, the Court finds that implementation of the merger is in the best interests of Westgate, Wescal, Tri-County and their respective creditors and other parties in interest.

IV

Implementation of the merger will benefit Air California in the following principal respects:

A. Air California presently has the burdens, without the most significant benefits, of being a publicly owned company. Substantial management time is expended and significant costs are incurred by Air California because it is publicly held, including legal and accounting fees incurred in connection with its compliance with the reporting requirements of the Securities and Exchange Act of 1934. Because Westgate maintains its consolidated ownership of Air California in excess of 80% in order to maintain a mutually advantageous tax consolidation with Air California for federal income tax purposes, there does not exist a broadly based public market for Air California securities. Since Westgate has indicated that it has no present intention of selling its Air California shares, and since both Air California and Westgate do not intend to jeopardize the aforementioned tax benefits through a dilutive equity offering by Air California, these problems can be expected to continue unless the proposed merger is consummated. After the merger, the direct expenses and management effort involved in producing and distributing public reports in accordance with the federal securities laws would be reduced; Air California's only securities reporting requirements would be as a member of the Westgate group, the members of which would share expenses for such reports on an allocated basis. Air California's direct cost savings may be as much as Seventy Five Thousand Dollars ($75,000) per year. It is anticipated that Air California will have significant capital requirements over the long-term. In the event Westgate is reorganized as a publicly held company,

Air California, as a wholly owned Westgate subsidiary, should have greater access than at present to outside equity capital which is expected to be available to Westgate upon its reorganization, thereby reducing Air California's dependence upon financing through debt or debt equivalents.

B. Complete consolidation of Air California with Westgate would remove presently existing potential conflicts of interest which inhibit the flow of resources between Air California and Westgate. These potential conflicts arise because of the respective fiduciary obligations of Air California's management to its shareholders and that of the Trustees to the parties in interest to these proceedings. Upon removal of such conflicts by the merger, it is possible that cash not needed in Air California's operation may be utilized, subject to the supervision of this Court and consistent with contractual limitations applicable to Air California, to facilitate Westgate's reorganization. However, if Westgate is successfully reorganized as a viable and operating entity, it is anticipated that Westgate will have significant resources which would be available to Air California. The air transportation industry is subject to external pressures which create volatility in trafic, costs and revenue, and the availability of such additional resources, free of inhibitions on their flow imposed by minority ownership, might better enable Air California to cope with the adverse effects of such pressures. These potential benefits to Air California will be significant only if Westgate is successfully reorganized.

C. The merger will make a broader range of management skills available to Air California. Full utilization by Air California of existing Westgate management

experience is probably not possible without full Westgate ownership because of the above referenced potential conflicts of interest.

For the foregoing reasons the Court finds implementation of the merger to be in the best interests of Air California.

V

The Court also finds that implementation of the merger is fair, just and equitable to, and in the best interests of, Air California and its public shareholders, and that Westgate, the Trustees and Mr. James Leisner (who is both a Westgate and Air California director) have satisfied their fiduciary obligations to such shareholders. The Court bases its findings upon the following factors:

A. Upon the consummation of the merger, holders of Air California stock will be entitled to receive Westgate Certificates in proportion to their ownership of Air California stock. The Westgate Certificates will be automatically converted into common stock of Westgate upon final confirmation of a plan of reorganization for Westgate providing for the issuance of common stock. Such common stock will have a Reorganization Value equal to the face amount of the converted Westgate Certificates. The Westgate Certificates (or the common stock of Westgate into which they are converted) will be redeemable for cash in the amount of the face value of the Westgate Certificates, at the option of the holder, at any time from the effective date of the merger until 180 days after Westgate common stock is mailed to Westgate Certificate holders. Westgate will create a Redemption Fund at the time of the merger in an aggregate amount equal to the

total face amount of Westgate Certificates issued in connection with the merger. The Fund will be held and administered by an independent trustee and will not be subject to the claims of creditors of Westgate. The redemption feature of the Westgate Certificates will provide an opportunity for shareholders wishing to do so to receive cash immediately. Because the cash for redemption will be set aside in a segregated Redemption Fund, the redemption decision by each recipient of Westgate Certificates may be postponed until it is known whether and on what terms Westgate will be reorganized and whether, and at what prices, there will be a public market for Westgate's common stock. Holders of Westgate Certificates will be entitled to receive their pro rata share of income earned by the Redemption Fund after allowance for their allocated share of expenses of the Fund. Accordingly, the terms of the Westgate Certificate provide for the holders of Air California stock a flexible instrument which will enable them, at their option, to remain equity participants in the reorganized Westgate (assuming a plan is adopted which provides for the issuance of common stock) or to receive cash for their holdings.

B. The merger agreements provide for an exchange rate of Thirteen Dollars ($13.00) per share, which will be increased by an additional Two Dollars ($2.00) per share. The net result is that Air California's shareholders, other than Westgate, will receive a total of Fifteen Dollars ($15.00) face amount of Westgate Certificates in exchange for each share of Air California stock held by such shareholders. The Court has heard substantial testimony on the value to be ascribed to each publicly held share of Air California stock, including testimony by independent appraisers engaged by

Air California and Westgate for the purpose of establishing such a value; based upon such testimony, the Court finds that as of November 1, 1976 the fair value of the publicly held shares of Air Calfornia was $12.50 per share and that at the present time the fair value of such shares does not exceed $12.50 per share (without taking into account the effect, if any, on valuation by reason of 121,427 shares owned by Westgate which may be subject to promotional conditions). The agreements relating to the merger provide that Air California shareholders will receive a premium over and above the appraised value for Air California shares set by the independent appraisers and such exchange rate is substantially higher than the trading prices for Air California stock prior to the first public announcement of the merger. The Court also notes, without finding it necessary to pass upon the issue, that if the position of the Department is correct with respect to the merger constituting a distribution of assets, the $2.00 augmentation of the exchange rate adequately takes such promotional conditions into account in accordance with the Department's Decision; if, on the other hand, the Trustees are correct, Air California's public shareholders will, by the $2.00 increase of the exchange rate, receive a further premium for their shares. The Court therefore finds that the aggregate exchange rate, constitutes fair, just and equitable consideration for the non-Westgate holders of Air California stock.

Since the Court finds that the exchange rate proposed in the merger, as supplemented, is fair, just and equitable to the Air California shareholders and that the terms and conditions of the Westgate Certificates provide significant benefits to such holders, the Court

finds that the Agreement and Plan of Reorganization, the Agreement of Merger and the Westgate Certificates, as described in the Information Statement, are fair, just and equitable to all persons affected by the merger, including Air California and its public shareholders.

VI

The Westgate Certificates to be issued in exchange for Air California stock owned by shareholders other than Westgate (including the aggregate exchange rate) are fair, just and equitable to all persons affected by the proposed merger, including Air California and its public shareholders and satisfy the requirements for exemption from registration under Section 3(a)(10) of the Securities and Exchange Act and within the meaning of the California Corporate Securities Law and Rule 260.103(b) promulgated thereunder.

VII

This Court is, in the instant case, an appropriate Court of competent jurisdiction empowered to issue the necessary decree or order as contemplated by the California Corporate Securities Law and Rule 260.103 (b) promulgated thereunder and this is a proceeding of the type described in such Rule. The Westgate Certificates (and the Westgate common stock into which the Westgate Certificates will be converted if the Trustees' Plan of Reorganization is approved by this Court) are being issued under or pursuant to a Plan of Reorganization (in which Plan the merger of Air California into Wacco is an integral initial portion) which Plan, pursuant to the provisions of the National Bankruptcy Act, is subject to confirmation by this Court.

VIII

The merger agreements relating to the merger contemplate, as indicated above, the establishment of a Redemption Fund, which is to provide a source of payment to those Air California shareholders who elect to exercise their option to redeem their Westgate Certificates for cash. Upon establishment of such Fund pursuant to order of this Court, the Redemption Fund will be free and clear of all claims except those of the beneficiaries thereof in accordance therewith.

IX

Pursuant to the agreements relating to the merger, West Coast has agreed to transfer to Westgate all of its right, title and interest in and to the 691,279 shares of Air California's common stock of which it is the beneficial owner, such transfer to be subject to the rights of West Coast's creditors. Tri-County has undertaken to transfer to Westgate all of its right, title and interest in and to the 31,696 shares of Air California's common stock of which it is the record and beneficial owner, such transfer to be subject to the rights of Tri-County's creditors. Such transfers will be reflected in the inter-company accounts of Westgate, West Coast and Tri-County, and the principal consequence of such transfers will be to make Air California a first tier subsidiary of Westgate. The above described transfers to Westgate by West Coast and Tri-County, subject to preservation of the rights of West Coast's and Tri-County's creditors in accordance wih this Court's order, are proper and appropriate in facilitation of the merger and in simplification of Westgate's corporate structure.

X

Under the proposed merger, Wacco will be the surviving corporation and would change its name to Air California. Valley National Bank of Phoenix, Arizona ("Valley") has filed a claim against Westgate in its reorganization proceedings, and in connection with such claim asserts that the debt allegedly owing to it by Westgate is secured by the pledge of 691,279 shares of Air California stock (which constitutes approximately 77.8% of the outstanding stock of Air California). As a result of the merger, the existence of the allegedly pledged shares will cease. The merger agreements contemplate that Westgate will deposit with Valley an appropriate number of Wacco shares to be held by Valley as security for Valley's claim, subject to preservation in full of the rights, if any, of the various parties to these proceedings to challenge Valley's claim, including, Valley's claimed status as a secured creditor. Valley opposes the merger, and particularly the pledge of the Wacco shares in lieu of the Air California shares it presently holds. The Court finds that Wacco will be, for all intents and purposes, identical to Air California, subject to all contractual limitations presently applicable to Air California which limit its capacity to advance funds to Westgate. The Court further finds that notwithstanding the absence of a public market for Wacco stock, the economic value of the Wacco shares proposed to be pledged to Valley is at least equivalent to the value of the collateral heretofore held by Valley. By reason of the fact that none of the pledged Wacco shares will have promotional conditions affixed thereto, while a significant number of the Air California shares held by Valley do have such conditions (the Department's actions removing

such conditions is contingent upon the consummation of the merger), and by reason of the fact that as a consequence of the merger Air California will receive additional equity capital through the exercise of stock options, the Court finds that the value of the pledged Wacco shares is substantially in excess of the value of the pledged Air California shares. Furthermore and in any event, the value of the proposed collateral is substantially in excess of the maximum amount of Valley's claim. In light of the substantial identity of Wacco, after the merger, with Air California, prior to the merger, the Court finds that the merger, taken as a whole, does not effect a substitution of Valley's collateral, but in the event it is so considered, this Court has the jurisdiction, authority and ample grounds to compel such substitution. The Court further finds that this is a proper proceeding in which to authorize the merger and the pledge of Wacco shares to Valley and that Valley has had, in this proceeding, ample opportunity to present its position with respect to the merger and pledge, and, in fact, has done so. Accordingly, the Court finds that Valley's interests will be adequately protected by the pledge of the above-referenced Wacco shares in accordance with the order of this Court, and Valley's objections to the merger are denied.

XI

In connection with providing funds for the Redemption Fund, the Trustees have indicated that they propose to disburse $1,017,785 from Wescal (which entity does not have consequential bankruptcy claims against it other than those duplicative of claims against Westgate), which funds are presently invested in certificates of deposit. To the extent that Wescal will be

making such payments, the Trustees have indicated that the inter-company accounts will appropriately reflect Westgate's obligation to reimburse Wescal for the funds so advanced and that they will execute a Trustees' Certificate in confirmation thereof. The Court finds that the use of the funds of Wescal for purposes of contributing to the Redemption Fund is appropriate and in furtherance of the merger, and when made in accordance with the order of this Court and upon the execution of such Trustees' Certificate, will adequately protect the rights of creditors of Wescal.

XII

The Trustees have further advised the Court that they have arranged for a loan, subject to this Court's approval, from United California Bank ("UCB") pursuant to which UCB will loan Westgate, on a short-term basis, the remaining funds needed for the Redemption Fund. Such borrowing is to be reflected by a Trustees' Certificate. The Court, having reviewed the terms of the loan and the form of Trustees' Certificate, finds that this borrowing for the purpose of implementing the merger is appropriate and should be, and hereby is, approved.

XIII

If the merger is consummated in accordance with the provisions of these Findings of Fact, Conclusions of Law and Order, the conditions set forth in the Department's Order Removing Conditions will have been satisfied.

XIV

In entering the foregoing Findings of Fact, the Court has reviewed the record in these proceedings including without limitation the documentary evidence and testi-

mony (including the testimony of expert witnesses), and the Court has taken note of the credibility, independence and demeanor of the witnesses.

XV

To the extent appropriate, the foregoing Findings of Fact shall be deemed to be Conclusions of Law.

CONCLUSIONS OF LAW

I

The Agreement and Plan of Reorganization, Agreement of Merger, Redemption Fund Agreement and issuance of Westgate Certificates (including specifically the aggregate $15.00 exchange rate) are fair, just and equitable to, and in the best interests of, the above-named debtor estates and their respective parties in interest, Air California and Air California's shareholders.

II

The proposed transfer to Westgate of West Coast's and Tri-County's interest in and to the Air California shares in furtherance of the merger and simplification of Westgate's corporate structure, subject to preservation in full, in accordance with th is Court's order, of all rights of West Coast's and Tri-County's creditors whether secured or unsecured, is in the best interests of these debtor estates and their respective parties in interest, and adequately protects the interests of West Coast's and Tri-County's creditors.

III

The proposed pledge to Valley of a portion of Wacco shares of a value equal to or greater than the collateral formerly held by Valley, subject to preser-

vation of all rights of Valley, the Debtors and of other parties to these proceedings with respect to Valley's claim, in accordance with this Court's order, is proper and adequately protects the interests of Valley. This is a proper proceeding in which to authorize the merger and the pledge of a portion of the Wacco shares to Valley, and Valley has had in this proceeding, ample opportunity to present its position with respect to the merger and pledge, and, in fact, has done so.

IV

The terms and conditions of the merger and the Westgate Certificates proposed to be issued in exchange for Air California stock pursuant to the merger (including the exchange rate) are fair, just and equitable to all persons affected by the proposed merger, including Air California and its public shareholders and satisfy the requirements for exemption from registration under Section 3(a)(10) of the Securities Act of 1933 and within the meaning of the California Corporate Securities Law and Rule 260.103(b) thereunder.

V

This Court is, in the instant case, an appropriate court of competent jurisdiction empowered to issue the necessary decree or order as contemplated by the California Corporate Securities Law and Rule 260.103(b) promulgated thereunder and this is a proceeding of the type described in such Rule. The Westgate Certificates (and the Westgate common stock into which the Westgate Certificates will be converted if the Trustees' Plan of Reorganization is approved by this Court) are being issued under or pursuant to a Plan of Reorganization (in which Plan the merger

of Air California into Wacco is an integral initial portion) which Plan, pursuant to the National Bankruptcy Act, is subject to confirmation by this Court.

VI

The Air California Information Statement and the initial Application did not disclose the existence of the promotional conditions on 121,427 shares of Air California stock owned by Westgate. However, the circumstance which rendered such promotional conditions relevant, the position taken by the Department of Corporations with respect to the merger, was not known to Air California or the Trustees until after the preparation and mailing of the Information Statement and Application and after the holding of the Special Meeting of Air California's shareholders. The Trustees have taken the position that the non-disclosure was not "material"; various objectors have taken a contrary position. Whether or not such non-disclosure may be deemed material, the lack of such information in the Information Statement did not cause any injury to any Air California shareholder since, among other considerations: the outcome of the Special Meeting would not have been affected; prior to final approval of the merger or its consummation, the relevant information was fully disclosed to Air California's shareholders in the Supplemental Notice and in the Departmental Notice (relating to the public hearing held on May 13, 1977 in connection with the Trustees' Application For Removal of Conditions on Promotional Shares of Air California), and they were afforded two opportunities (before the Department of Corporations and this Court) to participate in public hearings related thereto; such proceedings resulted in an augmentation of the exchange rate by $2.00 per share, to a total of $15.00 per share of

Air California, clearly a benefit to such shareholders; and Air California unilaterally extended renewed appraisal rights to all Air California shareholders after all the relevant information became known. Accordingly the Court finds that such nondisclosure does not constitute a violation of Section 14 of the Securities Exchange Act, that the Information Statement was not deficient (and requires no supplementation pursuant to the Securities Exchange Act and no other supplementation beyond the Departmental Notice and Supplemental Notice) by reason of its not providing information concerning the promotional conditions, that the validity of the actions taken at the special meeting of Air California's shareholders is not affected thereby, and that the actions taken at such Special Meeting provide sufficient shareholder authorization to consummate the proposed merger.

VII

To the extent appropriate, the foregoing Conclusions of Law shall be deemed to be Findings of Fact.

ORDER

Upon the foregoing Findings of Fact and Conclusions of Law, and good cause appearing; now therefore, it is

ORDERED that the Trustees' Application for Authorization to Effect a Merger with Air California, as supplemented, be, and the same is hereby, approved in all respects; and it is further

ORDERED that the Agreement and Plan of Reorganization, Agreement of Merger, Redemption Fund Agreement and issuance of Westgate Certificates, as described in the Air California Information Statement and Trustees' Application and Supplemental Application, and all amendments thereto, are specifically approved, and the Trustees are authorized and directed to take all necessary and appropriate action to implement and complete the same as soon as practicable, including, without limitation, the issuance of Westgate Certificates to the holders of Air California stock at a total exchange rate of $15.00 per share; and it is further

ORDERED that the Trustees are authorized and directed to prepare, execute and deliver such further documentation and to take such further actions as are, in their judgment, reasonable and necessary in order to consummate the merger as soon as practicable, including without limitation the amendment, modification and supplementation of the above-referenced agreements as do not materially alter the transaction taken as a whole; and it is further

ORDERED that West Coast transfer its interest in 691,279 of Air California stock to Westgate, and that the Trustees of Westgate execute a Trustees' Certificate in favor of West Coast substantially in the form attached hereto as Exhibit "B" in order to preserve the rights of West Coast to the economic value so transferred; and it is further

ORDERED that Tri-County transfer its interest in 31,696 shares of Air California to Westgate and that the Trustees of Westgate execute a Trustees' Certificate substantially in the form attached as Exhibit "C" in order to preserve the rights of Tri-County to the economic value so transferred; and it is further

ORDERED that Wescal remit $1,017,785 to Westgate, all of which funds are presently invested in certificates of deposit, to be utilized to provide funding of the Redemption Fund, and that the Trustees of

Westgate cause Westgate's accounts to reflect Westgate's obligations to Wescal for the funds so advanced and execute a Trustees' Certificate substantially in the form attached as Exhibit "D" in accordance therewith; and it is further

ORDERED that upon consummation of the merger, Westgate deliver in pledge to Valley 78% of the outstanding stock of Wacco in lieu of the Air California stock presently held in pledge by Valley which will be cancelled by reason of the merger, provided however that such pledge shall be without prejudice to the rights of any party to these proceedings, including Valley and the Debtors, with respect to Valley's claim to be a secured creditor of Westgate, as such claim existed prior to consummation of the merger; and it is further

ORDERED that the Trustees are authorized to borrow funds from UCB for the purpose of completing the funding of the Redemption Fund, substantially on the terms and conditions as heretofore described to the Court, and in connection therewith the Trustees are authorized to issue upon the funding of such loan a Trustees' Certificate substantially in the form attached hereto as Exhibit "A"; and it is further

ORDERED that the Trustees be, and they hereby are, authorized and directed to take all further actions as are necessary and appropriate in furtherance of the merger which are consistent with these Findings of Fact, Conclusions of Law and Order.

JUDGMENT in accordance with these Findings of Fact, Conclusions of Law and Order to be entered forthwith.

/s/ Leland C. Nielsen
UNITED STATES DISTRICT JUDGE